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# REGULATION OF LAWYERS WITHOUT THE CODE, THE RULES, OR THE RESTATEMENT: OR, WHAT DO HONOR AND SHAME HAVE TO DO WITH CIVIL DISCOVERY PRACTICE?

W. Bradley Wendel\*

One of the most striking things to notice when “looking back” on the regulation of the legal profession is the relative absence of enforceable legal sanctions for unethical behavior by lawyers. Before the promulgation in 1970 of the ABA’s Model Code of Professional Responsibility, regulation of the legal profession was largely a matter of a fraternal body taking care of its own, and occasionally expelling miscreants.<sup>1</sup> Now, of course, there is a complex body of law, enforced by courts and regulatory authorities with overlapping jurisdiction, that governs a substantial amount of the day-to-day activities of lawyers. The magnitude of this change may be seen simply by comparing the scope of coverage of books such as Henry Drinker’s *Legal Ethics* from the middle of the century<sup>2</sup> with the multi-volume treatises, looseleaf services, and the Restatement of the Law Governing Lawyers that are available today. The change in how the profession is regulated has vastly outpaced the evolution of legal practice. Despite the frequent observation that the practice of law has changed in the last thirty years,<sup>3</sup> it has not changed *that* much—lawyers did basically the same things in 1965 as they do now, albeit not in multinational mega-firms, under the same billable hours pressures, or employing the same technological resources. Charles Wolfram has suggested several reasons for the markedly increased scope of regulation that occurred around the promulgation of the Model Code:<sup>4</sup> including the judicial expansion of tort remedies generally, which led to a dramatic increase in the number of malpractice claims filed against lawyers (a significant

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1. See Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. Chi. L. Sch. Roundtable 469 (2001); Geoffrey C. Hazard, Jr., *The Legal Profession: The Impact of Law and Legal Theory*, 67 Fordham L. Rev. 239, 244-45 (1998).

2. Henry S. Drinker, *Legal Ethics* (1953).

3. For an excellent history of recent changes in large-firm practice, see Andrew L. Kaufman & David B. Wilkins, *Problems in Professional Responsibility for a Changing Profession* 770-76 (4th ed. 2002).

4. Charles W. Wolfram, *Toward a History of the Legalization of the American Legal Profession—II. The Modern Era*, 15 Geo. J. Legal Ethics 205 (2002).

source of legal norms governing the practice of law); encroachment by the regulatory state on all facets of what had formerly been regarded as private activities; an ideological transformation among lawyers from public-spirited actors with significant independence from their clients (think of Brandeis's "lawyer for the situation") to agents of clients; and, finally, social changes in the profession, such as increased diversity and the growing number of law school graduates.<sup>5</sup> Taken together, these factors explain a sea change in public attitudes toward regulation of the legal profession. The modern attitude is summed up in Wolfram's title—the legal profession has been legalized, just as any other complex, economically significant industry in the regulatory state.

In looking back on the regulation of the profession prior to the promulgation of the ABA Model Code and Rules, the publication of the Restatement, and the tinkering of the Ethics 2000 Commission, one wonders how it was possible to maintain any semblance of control over the legal profession. Lawyers are an argumentative, cantankerous, and independent lot, so it seems unlikely that legal practice would be inherently orderly. Yet, the profession did not exist in a state of anarchy prior to 1970. The hypothesis I explore in this essay is that there are nonlegal, generally informal mechanisms available by which lawyers control one another, from within the profession, rather than relying on formal, legal, externally imposed systems of rules. Moreover, these nonlegal methods do a pretty fair job of maintaining stability and order under some circumstances. The regulation of a social group apart from the legal system can be described using a variety of terms: social capital,<sup>6</sup> reputational markets,<sup>7</sup> nonlegal sanctions,<sup>8</sup> non-contractual relationships,<sup>9</sup> "microlaw,"<sup>10</sup> social norms,<sup>11</sup> and "nonlegally enforced rules and

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5. *Id.*

6. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 18-26 (2000).

7. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 Colum. L. Rev. 509 (1994).

8. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115 (1992) [hereinafter "Bernstein, *Diamond*"]; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724 (2001) [hereinafter "Bernstein, *Cotton*"]; David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373 (1990).

9. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55 (1963) [hereinafter "Macaulay, *Non-Contractual Relations*"].

10. W. Michael Reisman, *Law in Brief Encounters* (1999).

11. See, e.g., Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 Chi.-Kent L. Rev. 1537 (2000).

standards”<sup>12</sup> are all explanatory concepts that crop up in the literature on “order without law.”<sup>13</sup>

In keeping with this symposium’s theme of intentional anachronism, I would like to consider the use of an old-fashioned concept, honor, as the basis of a system of social control for lawyers. It actually may be unfair to call honor old-fashioned, because there has recently been a vigorous revival of the study of honor in political theory,<sup>14</sup> but to most lawyers, the word would probably have fusty, aristocratic, and moralistic connotations. Indeed, the use of the term in common discourse does tend toward the sanctimonious and conservative. Lawyers are forever being exhorted to remember some past Golden Age in which gentlemanly behavior was widespread, hardball tactics and incivility were unknown, and a man’s word was his bond—in short, a world governed by the popular notion of honor.

In reality, however, the ethics of honor turn out to be much more complicated. In short, honor is the basis of a system of social control which places reputation at the fore, and in which public challenges to the reputation of elite individuals serve as rituals for enacting normative conflict. The central role of reputation and public acclaim or opprobrium in the social standing of public actors, such as politicians, military officers, and business leaders, is a constant theme in historical studies of honor. Although persons (almost always men) of high standing formed an elite, their actions were subject to popular control through the power of the public to diminish the standing of elite actors.<sup>15</sup> The result is a political ideal that “combines personal ambition with principled codes of conduct.”<sup>16</sup> In the terms familiar

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12. Edward Rock & Michael Wachter, *Meeting By Signals, Playing By Norms: Complementary Accounts of Nonlegal Cooperation in Institutions*, 36 U. Rich. L. Rev. 423, 435 (2002).

13. Cf. Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991).

14. See, e.g., Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (2001); Sharon R. Krause, *Liberalism With Honor* (2002). For some of the leading works that preceded the “new honor literature,” see, for example, Kenneth S. Greenberg, *Honor & Slavery* (1996). See also William Ian Miller, *Humiliation and Other Essays on Honor, Social Discomfort, and Violence* (1993); Frank Henderson Stewart, *Honor* (1994); Bertram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South* (1982); Honour and Shame: The Values of Mediterranean Society (J.G. Peristiany ed., 1965) [hereinafter Peristiany]. There has also been a great deal of interest taken by the popular media in the subject of modern-day honor as understood in the Balkans and Southeast Asia. See, e.g., Scott Anderson, *The Curse of Blood and Vengeance*, N.Y. Times, Dec. 26, 1999, § 6 (Magazine), at 28 (Albania); Rick Bragg, *Afghan and Pakistani Tribe Lives by Its Guns and Honor*, N.Y. Times, Oct. 21, 2001, at A1 (Pashtun tribe).

15. Freeman, *supra* note 14, at 58-60; Krause, *supra* note 14, at 104. This is a major theme of Bertram Wyatt-Brown’s study of southern honor as well. See, e.g., Wyatt-Brown, *supra* note 14, at 14, 34, 54, 67-72, 113-14, 347-48.

16. Krause, *supra* note 14, at 99. Freeman similarly notes in the political rhetoric of the early Republican period an attempt to distinguish between self-serving, factional politicians and servants of the public good, and the congruence of this

from legal ethics, honor might be the term given to the virtue of properly balancing the opposing obligations to be a zealous advocate for the interests of one's client, as well as an officer of the court. Honor "retains the powerful partiality of self-concern"<sup>17</sup> (which, in the case of actions by professionals may translate into concern for one's client) but is constrained by the public regarding ideals embodied in public principles that political leaders and professionals must respect.

Some legal ethicists have been quite candid in recommending the restoration of honor as the foundation for the regulation of the legal profession. "The morals of the gentleman are an ethic for the professions," wrote Thomas and Mary Shaffer.<sup>18</sup> The authority of the moral proscriptions recommended by Henry Drinker, for example, derive from his social status, which reflected his ethical sensibilities: "He was a gentleman; he knew what made a person morally unfit to practice law."<sup>19</sup> Even today, in a society that claims to have rejected the social role of the "gentleman," television portrayals of lawyers frequently show the resolution of moral dilemmas by a wise, generally male, elder statesman, whose experience, judgment, and craftsmanship mark him as a person of ethical probity who understands how a good person is supposed to act in practical situations.<sup>20</sup> The virtue of the gentleman can therefore be called "practical wisdom," giving it an Aristotelian gloss.

Talking about Aristotle and *phronesis* of course brings to mind *The Lost Lawyer*, Anthony Kronman's magisterial work on the legal profession.<sup>21</sup> Kronman argues that practical wisdom, which is the characteristic ethical faculty of lawyers, is not possessed equally by all. Through experience, lawyers acquire the ability to balance commitment to their clients' causes (which Kronman calls sympathy) with an appreciation for the social interest that professionals are called upon to keep in mind (detachment). There is no formula or algorithm which tells a lawyer the proportion of sympathy and detachment that a particular case demands. An unpopular client facing the full wrath and power of the state (John Walker Lindh is a recent example) deserves almost total commitment from his lawyer,

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distinction with the notion of honor. Freeman, *supra* note 14, at 167-68, 170-71, 183, 186-87.

17. Krause, *supra* note 14, at 108.

18. Thomas L. Shaffer & Mary M. Shaffer, American Lawyers and Their Communities: Ethics in the Legal Profession 34 (1991).

19. *Id.* at 4.

20. *Id.* at 31. Even a progressive scholar like William Simon is occasionally impressed by the capacity of moral elites to prevent the degeneration of ethical standards. He notes the practice of paying "low-risk" bribes in connection with deals involving tax abatements and building inspections, and contrasts the acquiescence of low-status lawyers with the "unwillingness of elite practitioners" to facilitate these bribes. William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1130 (1988).

21. Anthony T. Kronman, *The Lost Lawyer* (1993).

the interests of society be damned. But lawyers for a powerful entity with the capacity to shape the law in its own interest, such as the government or a large corporation, must recognize that they alone have the ability to align their clients' actions with the common interest; thus, a considerably greater measure of detachment is required. Appreciating the relevant facts, perceiving analogies with other cases, and fitting one's actions to the particulars of a situation are the essence of the virtue of practical wisdom.

The overlap between Kronman's work and the ethics of honor comes in Kronman's candid admission that practical wisdom is the province of an elite caste. Although any lawyer can aspire to it, and through experience gain a measure of practical wisdom, only the wisest, most virtuous lawyers deserve emulation. These exemplary figures, called "lawyer-statesmen" by Kronman,<sup>22</sup> have worked for private entities and within government, so they can see issues from the perspective of both a private client and the social interest. Moreover, their long careers have given them the financial independence to decline to take cases from undeserving clients. As a result, these lawyers and their actions provide ethical guidance for the rest of us. Something of the awe that the lawyer-statesman is supposed to inspire can be perceived from Steven Lubet's story of the day Albert Jenner came to the ordinary peoples' court.<sup>23</sup> As Lubet relates the story, he was a legal services lawyer with a specialization in landlord-tenant and consumer debtor cases, practicing in barely contained pandemonium on the eleventh floor of the municipal court building in Chicago.<sup>24</sup> No one was professional or civil to one another, the judges and court personnel treated poor litigants with undisguised contempt, and the courthouse regulars were far more concerned with pleasing the repeat-player creditors and landlords than ensuring that the defendants had a fair hearing.<sup>25</sup> All this changed one day when Albert Jenner, the former counsel to the Senate Watergate Committee and a name partner in Jenner & Block, with his "stern countenance, ramrod posture, piercing eyes, and signature bow tie" unexpectedly showed up to handle a case:<sup>26</sup>

[T]he entire courtroom suddenly metamorphosed. The muttering plaintiffs' bar fell silent. Clerks began answering inquiries from unrepresented defendants. The judge actually asked questions about the facts and the law. It was as though we were now in a real courtroom where justice, and people, mattered. Furthermore, this effect lasted for the entire day, long after Mr. Jenner left.<sup>27</sup>

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22. *Id.* at 3 & *passim*.

23. Steven Lubet, *Professionalism Revisited*, 42 *Emory L.J.* 197 (1993).

24. *Id.* at 204-06.

25. *Id.*

26. *Id.* at 206.

27. *Id.*

Now *that* is honor. Jenner was not just any person with inherent human dignity and all those good liberal qualities—he was *somebody*. His reputation shamed the lawyers and judges around him into living up to their own ideals. When lawyers resurrect the ethics of honor, they are thinking of people such as Jenner and Kronman's lawyer-statesmen—people who change the whole atmosphere just by walking into the room. In a word, gentlemen. The goal of this essay is to explore whether it would be a good thing to have more gentlemen in the ranks of lawyers, or whether the world of honor is a world well lost.

A brief overview of the structure of this essay is in order. Part I briefly considers the ethics of honor, drawing primarily from the work of anthropologists and historians. The goal is to construct an ethic of honor for lawyers, and to imagine how the profession might be regulated in the absence of rules of professional conduct and the extensive law governing lawyers. This is not entirely fanciful, for as Joanne Freeman has shown,<sup>28</sup> the public behavior of federal politicians in the early Republican period was shaped by notions of honor, which served as a stability-ensuring structure in the absence of familiar modern institutions such as political parties. Even if one has little patience for the anachronistic language of gentlemen and honor, however, or is not well disposed to virtue ethics, in its classical or modern guises, it is difficult to peruse the recent legal theory scholarship without noticing an allied trend—the dramatic increase in the amount of attention paid to social norms and other mechanisms of nonlegal regulation of some activity. For this reason, part II takes a synoptic view of the literature on the nonlegal regulation of commercial relationships. I hope to persuade readers of the value of looking back at the ethics of honor, because I think the advantages and disadvantages of honor as a system of social control largely parallel the costs and benefits of nonlegal sanctions.

In order to demonstrate this claim, I rely throughout the essay on a case study, civil discovery, to explore the promise and pathologies of non-state control of a particular social activity. Discovery is a useful example because it takes place, by and large, under the judicial radar. Although discovery practice is extensively governed by rules of civil procedure, these rules largely operate as a shadow over the day-to-day interactions between lawyers.<sup>29</sup> I believe that the real work of controlling unethical behavior is done by nonlegal regulation. Trial judges rule on motions to compel or motions for protective orders, but the vast majority of disputes that arise in the course of discovery are

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28. Freeman, *supra* note 14.

29. The shadow metaphor is from an important paper on the everyday interactions between matrimonial lawyers. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).

“settled” by the parties among themselves, without judicial intervention.<sup>30</sup> The incentive structure that governs these negotiations is provided by nonlegal regulation: lawyers are concerned with maintaining good relationships with opposing counsel, keeping their present clients happy, attracting future business, and winning the favor of judges who preside over their cases. Because they have these concerns, lawyers are sensitive to informal sanctions such as gossip and “war stories” that might contribute to their reputations for aggressiveness or cooperativeness, retaliation by opposing counsel for uncooperative behavior, and the loss of credibility with the trial judge, which might result in losing a close call on a motion or evidentiary ruling.

Discovery practice operates within the shadow of the law, not subject to significant legal regulation. Discovery has been the object of a great deal of attention from the drafters of the rules of civil procedure, including recent comprehensive amendments, without much effect on the underlying problem of abuse. In federal courts, the rules were changed dramatically in 1993, with the adoption of compulsory disclosure,<sup>31</sup> mandatory discovery conferences at the outset of litigation,<sup>32</sup> limits on the number of depositions per case,<sup>33</sup> codification of the practice of providing logs for documents withheld under a claim of privilege or work product protection,<sup>34</sup> and modification of expert-witness discovery procedures.<sup>35</sup> In addition, courts around the country have adopted local rules or ad hoc orders respecting the conduct of discovery, in response to perceptions of widespread abuse of discovery.<sup>36</sup> Nevertheless, grumbling about

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30. As one sociologist reported,

[t]he judges and magistrates who referee the discovery game clearly prefer to stay above the fray, letting the lawyers decide the outcome. They do not have the time, staff, or incentives to either intervene in discovery disputes in a sufficiently active manner, take control of the process, or establish clear norms about the reasonableness of requests or responses.

Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 Fordham L. Rev. 773, 795 (1998).

31. Fed. R. Civ. P. 26(a)(1), (a)(3).

32. *Id.*, 26(f).

33. *Id.*, 30(a)(2)(A).

34. *Id.*, 26(b)(5).

35. *Id.*, 26(a)(2), (b)(4).

36. See, e.g., Appendix A, Proposed Standards for Professional Conduct Within the Seventh Federal Judicial Circuit, *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 441, 448 (1992); Discovery Guidelines of the United States District Court for the District of Maryland, in West's Maryland Rules of Court (2002); Guidelines to Civil Discovery Practice in the Middle District of Alabama, in West's Alabama Rules of Court (2001); Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339 (E.D.N.Y. 1984); Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988).



discovery abuse by lawyers and judges does not appear to have abated significantly.<sup>37</sup>

A further problem is that judges have largely withdrawn from the field, at least according to many litigators and commentators.<sup>38</sup> In many cases the judicial attitude toward discovery disputes is to call down a pox on the houses of both sides,<sup>39</sup> to give lawyers a “first bite free” and sanction only repeated or egregious abuses,<sup>40</sup> to split the difference by entering an order that does not strongly favor either side,<sup>41</sup> to assume that the dispute is just a childish squabble between disputatious lawyers, and command the parties to go off and work things out,<sup>42</sup> or to chastise the offending party but not impose real sanctions.<sup>43</sup> Naturally, the incentive for either party to behave reasonably is diminished if judges do not sanction the aggressor only, or if the magnitude of sanctions is not sufficient to deter misbehavior. The response to this umpireal vacuum seems straightforward—appoint more judges and train them to supervise discovery disputes. There are structural problems with judicial supervision of discovery, however, that make it difficult to remedy abuse by simply throwing more judges at the problem.

For one thing, discovery disputes are extremely fact-intensive, and a careful examination of the record is necessary to determine which of the parties is at fault for the impasse.<sup>44</sup> If a judge wishes to create good incentives and not merely award half of the remedy sought by the moving party, she must untangle a paper trail of requests, responses, correspondence seeking clarification, attempts at providing a response to these letters, and perhaps even arguments at an oral hearing. This can be impossible for state court judges who must

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37. Compare Nelson, *supra* note 30, at 805, and John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 Minn. L. Rev. 505 (2000), with Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 Am. B. Found. Res. J. 219 [hereinafter “Brazil, *Chicago Lawyers*”] (pre-amendments), and Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283, 284 (1996) (reporting events that occurred before the 1993 amendments).

38. Beckerman, *supra* note 37, at 561-65; Brazil, *Chicago Lawyers*, *supra* note 37, at 245-51; Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 Am. B. Found. Res. J. 787, 824-27 *passim* [hereinafter, “Brazil, *Civil Discovery*”].

39. See, e.g., *Johnson v. Sullivan*, 714 F. Supp. 1476, 1486 (N.D. Ill. 1989) (“Arguably, attorneys on both sides of this lawsuit have engaged in sanctionable conduct. In light of this mutual misconduct, the court sees no point in sanctioning either of the parties.”); Brazil, *Chicago Lawyers*, *supra* note 37, at 249.

40. Beckerman, *supra* note 37, at 574 & n.279; Brazil, *Chicago Lawyers*, *supra* note 37, at 248.

41. Nelson, *supra* note 30, at 797-98.

42. Beckerman, *supra* note 37, at 568; Brazil, *Chicago Lawyers*, *supra* note 37, at 245-46.

43. Beckerman, *supra* note 37, at 574-78.

44. Nelson, *supra* note 30, at 795; Beckerman, *supra* note 37, at 567-68; Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638-39 (1989).

oversee civil motions calendars with dozens of motions docketed each day,<sup>45</sup> but it is daunting even for judges who supervise individual cases, given the press of other business. The work is also pretty stultifying. Discovery disputes are framed by a series of requests, objections and responses, and subsequent correspondence, in which the parties seek to redefine the terms used in the requests, set out lengthy objections, and delimit the scope of compliance to avoid turning over harmful documents or answering interrogatories in a straightforward manner. In a complex case, these exchanges will involve convoluted definitions, general objections incorporated by reference, and similarly mind-numbing prose. Unfortunately, the tone of advocacy in discovery is far from high-minded, and is often characterized by charges and countercharges of sleazy behavior, dishonesty, and duplicity.<sup>46</sup> Few judges have the stomach for the task of wading through all of this, and would dearly love the parties just to work things out. Finally, judicial oversight of discovery will not deter abuse if the rationale for the abusive practices is to impose costs on the opponent. A motion to compel, with the extensive record that must accompany it, is a costly undertaking, so the aggrieved party is already forced to bear some costs as a condition of obtaining judicial relief.<sup>47</sup>

Thus, it is worth asking whether nonlegal sanctions might play a more significant role in controlling unethical behavior in this area. Another reason to focus the discussion of nonlegal sanctions on civil discovery is that the ABA section on litigation recently conducted a careful, interview-based study of the civil discovery process,<sup>48</sup> which can serve as a source of empirical information to test my hypothesis that informal methods of social control bring order, in the absence of law, to what would otherwise be an unruly process. Similar dynamics may exist in other areas of practice, such as transactional work, settlement negotiations, plea bargaining, and client counseling, which operate largely in the shadow of legal rules.

Part III then briefly considers how nonlegal regulation might actually work. This section is a bit more speculative, although there is abundant anecdotal evidence that the sorts of shaming rituals, gossip, and tit-for-tat cycles of retaliation that are familiar from the ethics of

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45. Brazil, *Chicago Lawyers*, *supra* note 37, at 247.

46. Beckerman, *supra* note 37, at 568-69.

47. See Beckerman, *supra* note 37, at 551-52; John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. Rev. 569, 593 (1989).

48. For a description of the study's methodology, see Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 Fordham L. Rev. 837 (1998). Useful interpretations by legal sociologists on the findings of the study include Nelson, *supra* note 30; Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 Fordham L. Rev. 709 (1998); Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 Fordham L. Rev. 809 (1998).

honor play a significant role in regulating the practice of law. (After I wrote a paper on the theory of nonlegal sanctions,<sup>49</sup> I received numerous e-mails from former practitioners sharing their own stories to illustrate these sanctioning processes.) There is also some empirical evidence from the careful studies of nonlegal regulation in other contexts, in particular Lisa Bernstein's wonderfully in-depth and rigorous articles about the cotton and diamond industries.<sup>50</sup> Because of the wealth of detail in those works, it may be possible to extrapolate from them to the regulation of lawyers, or to draw relevant distinctions between these industries and the practice of law. In general, though, nonlegal sanctions are punishments within the control of the participants in a given market. In the cotton industry, for example, untrustworthy merchants may lose business, and cheating in transactions is controlled by the possibility of negative gossip that will inevitably circulate about the cheater. In litigation, by analogy, we would expect to find that certain kinds of conduct will subject the offender to penalties, imposed either by the adversary at some later point in the litigation, or by future adversaries who learn of the offender's reputation. These penalties generally include the imposition of costs through an unwillingness to deal informally (by phone calls rather than letters, for example) or by employing a more expensive litigation strategy (by contesting every legal and factual issue rather than stipulating, for instance).

Finally, part IV draws these various strands together by discussing the implications of nonlegal regulation for legal regulation. I certainly do not think that courts and disciplinary agencies should get out of the business of regulating the practice of law. The regulatory approach to many areas of practice is a good thing, as compared with mere exhortations to behave ethically. Nonlegal regulation is not the same thing as preaching professionalism, of course, because it works even with lawyers who are disinclined to act against their self-interest. The theory of nonlegal sanctions assumes that ethical reasons alone are not sufficient in every case to inspire conformity to standards of cooperativeness in litigation. Rather, what is needed is a carrot-and-stick approach—tangible benefits such as flexibility for acting appropriately, and concrete detriments such as the loss of business for behaving unethically. The difference between this approach to regulation and formal, centralized legal sanctions is that the benefits and punishments are determined by other participants in the market, other lawyers and current and potential clients, instead of by a state actor. Even with the added incentives of nonlegal sanctions, however, regulation apart from the state is not always the best solution. For one thing, nonlegal sanctions may be exploited as weapons, just as

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49. W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 Vand. L. Rev. 1955 (2001).

50. Bernstein, *Cotton*, *supra* note 8; Bernstein, *Diamond*, *supra* note 8.

surely as they can be used as restraints on unethical conduct. There must be, in effect, meta-norms regulating the use of nonlegal sanctions, and these norms must themselves be backed up with effective sanctions. It may be less expensive and cumbersome in some cases to replace this multi-layered system of norms with an enforceable legal rule. But, information costs are often lower for market participants who impose nonlegal sanctions. Where the cost of proving an ethical breach to an authoritative decisionmaker is high, as compared with the cost of imposing a nonlegal penalty, we would expect nonlegal regulation to be more efficient.

In addition to considering the costs and benefits of nonlegal sanctions, part IV briefly suggests some ways in which changes in legal norms and the structure of the legal profession may affect the functioning of nonlegal sanctions. For example, as law firms grow by merger and acquisition, and open branch offices in different jurisdictions, it becomes more difficult to control individual lawyers within the firm. Where firms are smaller, they may carefully cultivate a reputation for honesty and probity, which in turn provides them a useful product to sell to clients—namely, the ability to work informally and therefore inexpensively with opposing counsel. The larger a firm becomes, the more difficult it is for outsiders to generalize about its reputation, because there may be individual lawyers within the firm who vary a great deal in their cooperativeness. Similarly, as more lawyers practice in multijurisdictional contexts—say, frequently appearing as national coordinating counsel in local product liability lawsuits—it becomes exponentially more difficult for lawyers and clients in a given locality to learn about the character of the lawyers against whom they are practicing in a particular case. Finally, the increasing diversity in all respects (socioeconomic, racial, gender, clientele, and so on) of the practicing bar makes it more difficult to rely on considerations of character and reputation, because the interpretation of actions may be different in these varied social subcommunities. The most significant factor in the success of nonlegal regulation is the size, geographic concentration, and homogeneity of the relevant market. To the extent legal and structural changes tend to make the marketplace larger (for instance, by relaxing conflicts rules to permit firms to become larger), they will likely undermine the efficacy of nonlegal sanctions, and vice versa.

## I. LOOKING BACK: THE ETHICS OF HONOR

Honor is an ethical system in which one's outward presentation as a worthy person is confirmed or challenged by others in the relevant social group, who confer honor on persons exhibiting valued characteristics and shame on those who deviate from prescribed

standards.<sup>51</sup> By “ethical,” I mean that it is a system of social control which relates to personal characteristics that can be judged as normatively attractive insofar as they contribute to the good of society;<sup>52</sup> in this way it is different from fads and trends that form around ephemeral phenomena such as fashion. Honor is different from familiar ethical theories, however, in being strongly oriented toward external manifestations of social status, instead of inner qualities such as virtues or motivations.<sup>53</sup> “The man of honor does not care if he stinks, but he does care that someone has accused him of stinking.”<sup>54</sup> Indeed, the preoccupation with reputation and esteem that is most characteristic of honor is perceived as somewhat deviant in moral philosophy, which is concerned with explaining why people ought to aspire to act rightly or to be genuinely good, regardless of whether they enjoy a reputation for probity.<sup>55</sup> Inner qualities are important, particularly because the values of an honor group may be internalized. A person may *feel* shame for failing against standards that he has made his own, but that emotional reaction does not alter the priority of outward appearances, public personas, and presentation to social peers as the foundations of normative judgments in an honor system. A person is only actually *shamed* when public perception overlaps with one’s affective response to having failed by communal standards.<sup>56</sup>

The conditions under which a person may gain and lose honor are complex and subtle; they may be codified (a project for many theorists in cultures with a flourishing ethics of honor<sup>57</sup>), but these rules are

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51. Stewart, *supra* note 14, at 145-46; Wyatt-Brown, *supra* note 14, at 155; J.G. Peristiany, *Introduction*, in Peristiany, *supra* note 14, at 9, 10-11; Julian Pitt-Rivers, *Honor and Social Status*, in Peristiany, *supra* note 14, at 19, 21-22.

52. Stewart, *supra* note 14, at 46.

53. Freeman, *supra* note 14, at 59, 119, 125, 168; Greenberg, *supra* note 14, at 3, 7, 15; Miller, *supra* note 14, at ix; Wyatt-Brown, *supra* note 14, at 14, 126-27, 132, 150. As Frank Henderson Stewart writes, in one of the few philosophical treatments of the subject:

The more closely one looks at honor, the odder it seems. . . . Honor is the reward of virtue, so the old books tell us again and again; yet a virtuous man can be dishonored through no fault of his own. Someone who wrongfully impugns my honor . . . may have to pay a price for it—but he has not thereby acted dishonorably.

Stewart, *supra* note 14, at 145.

54. Greenberg, *supra* note 14, at 14.

55. Compare this to the challenge issued to Socrates by Glaucon in the *Republic*. See Plato, *Republic*, Book II, at 358c-360d (Paul Shorey trans.), in *The Collected Dialogues of Plato* 606-08 (Edith Hamilton & Huntington Cairns eds., 1961).

56. Miller, *supra* note 14, at 134-35; Wyatt-Brown, *supra* note 14, at 155, 309. Shame and honor, in most accounts, are two sides of the same coin. William Ian Miller summarizes their relationship in medieval Iceland: “In the sagas, the norms of honor, the norms of proper behavior, in fact, are as often expressed negatively in terms of shame avoidance as they are positively in terms of honor acquisition.” Miller, *supra* note 14, at 119.

57. See, e.g., *The Code of Lekë Dukagjini* (Shtjefën Gjeçov ed., Leonard Fox

generally internalized by individuals as part of their upbringing so that they comply more or less automatically, rather than being conscious of following rules.<sup>58</sup> Most scholars of honor agree that, although it may in principle be possible to set out the code of honor in detail, in practice the particulars of the situation matter a great deal in the community's ascriptions of honor and shame. Indeed,

The shameful could not be reduced to a litany of rules. The particulars of context were crucial in the determination of how much and whether shame was done or suffered. The identity of the parties, their past history of dealings, their relative popularity, the particular failing at issue, all figured in the moral calculation.<sup>59</sup>

Sensitivity to context—what would be called “judgment” by professional ethicists today<sup>60</sup>—was essential to evaluating the effect on a person's honor of an incident and the person's reaction to it. Because context mattered so much, it was also important that those interpreting an affair of honor shared a rich set of understandings about the meaning of actions, words, and gestures.<sup>61</sup> In honor-governed societies, the relevant group against which one measured conduct tended to be small and homogeneous, because larger groups complicated the business of establishing a reputation, observing one another's actions, and sanctioning those who deviated from the group's norms. According to J. G. Peristiany, “[h]onour and shame are the constant preoccupation of individuals in small scale, exclusive societies where face to face personal, as opposed to anonymous, relations are of paramount importance and where the social personality of the actor is as significant as his office.”<sup>62</sup> By contrast, honor does not work well as a means of social control in large, fragmented, pluralistic, bureaucratic societies. The obscurity of individuals in mass societies interferes with the processes by which communities regulate themselves by means of attaching public consequences to people's actions.<sup>63</sup>

Tocqueville believed that any association of individuals who have a need for order establishes an honor system: “[E]very time men come together to form a particular society, a conception of honor is immediately established among them, that is to say, a collection of

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trans., 1989) (Albania); John Lyde Wilson, *The Code of Honor; Or Rules for the Government of Principals and Seconds in Duelling* (Ray Rilling Publisher 1951) (1858) (American South). See also the reference in Stewart to Giovanni Battista Possevino, *Dialogo Dell'Honore* (1553), a fascinating-sounding, but rare, book about honor norms in Italy. Stewart, *supra* note 14, at 89-90.

58. Miller, *supra* note 14, at 127; Stewart, *supra* note 14, at 24, 47.

59. Miller, *supra* note 14, at 119.

60. See Kronman, *supra* note 21, at 97, 167, 193; Donald A. Schön, *The Reflective Practitioner* 59-69 (1983).

61. Freeman, *supra* note 14, at 74-75, 170-71.

62. Peristiany, *supra* note 14, at 11.

63. Krause, *supra* note 14, at 73-75.

opinions peculiar to themselves about what should be praised or blamed.”<sup>64</sup> It was important for Tocqueville to distinguish “aristocratic honor” of the *ancien regime* from conceptions of honor appropriate to a democracy, so he downplayed the hierarchical nature of honor. But it is hard to escape the conclusion, from studies of many cultures and historical times, that honor is inseparable from inequality.<sup>65</sup> Hospitality and the networking of gift-giving relationships in the antebellum South defined insiders and outsiders, and marked off a boundary between people who were of concern to those of power and influence and those whose fates were a matter of indifference.<sup>66</sup> Similarly, traditional military conceptions of honor emphasized rank distinctions between officers and enlisted men, and required the two classes to maintain distance in social relationships.<sup>67</sup> The centrality of hierarchy may be understood as a consequence of the need for small size and homogeneity. In a large group, it is necessary to create subgroups in which people can compete for attention and precedence, and which share the same values and understandings about how people ought to behave in given circumstances.

Far more than familiar modern ethical systems, honor relies on an *agon* of individuals competing for glory and recognition. The community confers honor and accords certain rights to persons marked off as honorable.<sup>68</sup> The most honorable members of the group serve as examples for others to emulate, and their actions are sources of moral instruction.<sup>69</sup> (The story of Albert Jenner illustrates this process at work among lawyers.<sup>70</sup>) At the same time, persons of honor are always in danger of being knocked off the pedestal, so to speak, by being challenged and failing to respond appropriately.<sup>71</sup> “[I]f A impugns B’s honor, then B’s honor is ipso facto diminished or destroyed, unless B responds with an appropriate counterattack on A.”<sup>72</sup> For example, one of the privileges of being a man of honor was that one’s word had to be respected just because it was the word of a gentleman.<sup>73</sup> This right could be lost, however, if a gentleman were

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64. Alexis de Tocqueville, *Democracy in America* 620 (J.P. Mayer ed., George Lawrence trans., 1969).

65. See, e.g., Greenberg, *supra* note 14, at 62-63, 74; Miller, *supra* note 14, at 116; Stewart, *supra* note 14, at 54, 67; Wyatt-Brown, *supra* note 14, at 331-32.

66. Greenberg, *supra* note 14, at 80-86; Wyatt-Brown, *supra* note 14, at 331-37.

67. Stewart, *supra* note 14, at 59.

68. *Id.* at 28-30.

69. See Peristiany, *supra* note 14, at 10; Pitt-Rivers, *supra* note 51, at 19, 22.

70. See *supra* notes 23-27 and accompanying text.

71. Freeman, *supra* note 14, at 149-51; Miller, *supra* note 14, at x; Stewart, *supra* note 14, at 23-24; Pitt-Rivers, *supra* note 51, at 26.

72. Stewart, *supra* note 14, at 64; see also Pitt-Rivers, *supra* note 51, at 43, 47-48.

73. Freeman, *supra* note 14, at 67; Greenberg, *supra* note 14, at 31-34, 36-37, 39, 41, 44, 69, 73; Wyatt-Brown, *supra* note 14, at 56 (“An oral pledge from a gentleman was thought to be the equivalent of a signed oath . . .”).

unmasked as being a liar. For this reason, accusations of lying were highly inflammatory and even veiled allegations of duplicity could provoke a violent response. One of the surest ways to provoke a duel was to “give the lie” to an adversary, publicly accusing him of not living up to his self-presentation as a gentleman.<sup>74</sup> Kenneth Greenberg notices the interesting syntax of that expression. “The act of lying did not mean you actually *had* the lie. Someone had to ‘give it’ to you—had to call you a liar. You did not own a lie until you were called a liar.”<sup>75</sup>

In the eighteenth and nineteenth centuries in the United States, there were a number of words—coward, poltroon, puppy, scoundrel, rascal—whose social meanings were unmistakable.<sup>76</sup> They are accusations of being merely a pretender to honorable status, and not worthy of public esteem. In addition, a communication could be understood as “giving the lie” despite its speaker’s intentions, freighting the process of political debate with the threat of violence if the speaker’s message was misunderstood.<sup>77</sup> In cases where maximum clarity was required, there were dramatic rituals whose social meaning was unambiguous, serving as challenges to another’s honor; these included horsewhipping and caning (which implied the victim’s inferior status, because only equals were entitled to duel) and nose-tweaking (which struck symbolically at the victim’s face, his self-presentation).<sup>78</sup>

Once someone gave a person of honor the lie (or pulled his nose, for that matter), that person had no choice but to demand satisfaction, in the form of a duel, or lose his entitlement to public respect. The dueling ritual enabled a dishonored person to regain his social standing by exhibiting bravery in the face of death—in short, proving himself willing to prefer death over shame.<sup>79</sup> The sangfroid displayed by the participants on the dueling ground was a critical element to establishing themselves as worthy of the community’s respect.<sup>80</sup> Thus,

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74. Freeman, *supra* note 14, at 67, 173; Greenberg, *supra* note 14, at 8-9. The equivalent in Bedouin society is “blackening,” which occurs either by a ritual utterance such as “May God blacken X’s face” or by an act such as placing black stones or flags in a public place. Stewart, *supra* note 14, at 82-83.

75. Greenberg, *supra* note 14, at 32; see also Miller, *supra* note 14, at 119.

76. Freeman, *supra* note 14, at 43, 121, 135, 174; Greenberg, *supra* note 14, at 9; Wyatt-Brown, *supra* note 14, at 360. As Stewart notes, only certain insults that touch on socially valued characteristics count as challenges to one’s honor. In most honor cultures, if *A* called *B* a liar or a coward it would lead to a duel, but calling *B* “unforgiving, cruel, insensitive, lacking in humility, or uncharitable” would not have the same effect. Stewart, *supra* note 14, at 65.

77. Freeman, *supra* note 14, at 28-31, 83-84; Greenberg, *supra* note 14, at 16, 18-19, 55-57; Douglas H. Yarn, *The Attorney as Duelist’s Friend: Lessons from the Code Duello*, 51 Case W. Res. L. Rev. 69, 92-94 *passim* (2000).

78. Freeman, *supra* note 14, at 172; Greenberg, *supra* note 14, at 18, 20-22.

79. Freeman, *supra* note 14, at 167, 178; Greenberg, *supra* note 14, at 18, 58, 74; Wyatt-Brown, *supra* note 14, at 353.

80. Freeman, *supra* note 14, at 172; Stewart, *supra* note 14, at 141-42.



the central function of the dueling ritual was to obtain public vindication of a man's claim to honorable status and to underscore his entitlement to be a political or social leader.<sup>81</sup> Indeed, "men of various positions in the local hierarchy acted as a Greek chorus in the Sophoclean drama."<sup>82</sup> Duels only followed the breakdown of negotiations, carried on over a period of days or weeks, in which intermediaries tried to assuage the injured pride of the challenger and provide a face-saving alternative to violence.<sup>83</sup> This was often successful, and the relatively small number of duels involving well known political figures (such as Alexander Hamilton and Aaron Burr) belies the greater number of "affairs of honor" that were settled before bloodshed.<sup>84</sup>

Although I am certainly not praising duels or recommending their resumption, there is at least one aspect of "affairs of honor" that deserves our attention today. Honor, as a system of social control, stands apart from state-sponsored methods of regulation. Historically in the United States, and in modern honor cultures, persons who respected the ethics of honor would never have countenanced seeking official legal redress for injuries to their reputation.<sup>85</sup> As Montaigne wrote, "He who appeals to the laws to get satisfaction for an offense to his honor, dishonors himself."<sup>86</sup> And as the historian Bertram Wyatt-Brown observed, legal institutions did not aspire to regulate some spheres of activity. According to Wyatt-Brown, "[t]he courts and lawmakers never put honor into statutory or judicial form because it was commonly understood that there should be a division between the workings of the law and the stalwart defense of a man's sense of self."<sup>87</sup> For example, President Andrew Jackson, after having his nose pulled by a disgraced former naval officer, insisted on taking control of the situation himself, and rejected the interference of the courts in what he regarded as "an affair of honor."<sup>88</sup> As a result of the stark separation between one's honor (which must be regained by dramatic personal action) and one's juridical rights, honor serves as a check on state power. "Its high ambitions make honor difficult to

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81. Freeman, *supra* note 14, at 170, 184-85; Wyatt-Brown, *supra* note 14, at 353-57.

82. Wyatt-Brown, *supra* note 14, at 356.

83. Freeman, *supra* note 14, at 177-80; Greenberg, *supra* note 14, at 8; Yarn, *supra* note 77, at 87-90.

84. Freeman, *supra* note 14, at 167. Hamilton alone was a principal in *eleven* affairs of honor, refused to engage with another man deemed of low status, and served as a second in two other affairs. *See id.* at 326-27 n.13.

85. Stewart, *supra* note 14, at 79-80; Wyatt-Brown, *supra* note 14, at 370 (noting that "individuals had the authority to patrol their own social and ethical space"); Pitt-Rivers, *supra* note 51, at 30.

86. Stewart, *supra* note 14, at 80 (quoting Michel de Montaigne, *Essays* 85 (bk. 1, ch. 23) (1958)).

87. Wyatt-Brown, *supra* note 14, at 305.

88. Greenberg, *supra* note 14, at 20-22.

subjugate . . . .”<sup>89</sup> The term “sacred honor” in the Declaration of Independence is no mere rhetorical flourish; the colonists’ objection to parliamentary taxation was precisely that it was dishonorable to be forced to pay taxes to the metropolitan government, rather than offering them as “gifts” through their elected representatives.<sup>90</sup> Furthermore, the importance of honor to the self-conception of the American founders supplied the motivation to undertake the courageous act of rebellion in defense of the “certain inalienable rights” being infringed by Britain.<sup>91</sup>

There is naturally a flip-side to the capacity of honor to ground resistance to state authority, which is essentially the moral case for the rule of law. For all the benefits of conscientious objection, jury nullification, and the “moral pluck” of lawyers who refuse to see themselves as merely rule-bound hired guns,<sup>92</sup> these activities threaten to undermine the stability of a government of laws and to reintroduce the anarchy that the legal system is intended to prevent. A legal public execution and the “communal rite of lynching”<sup>93</sup> are similar processes in the sense that they exhibit the triumph of right over wrong (as those concepts are understood in the community) and reassert social order.<sup>94</sup> But a legal execution proceeds (at least theoretically) with due process of law, while a lynching is a paradigmatically lawless act. Significantly, it is lawless, but it is not random from the standpoint of the community’s values.

One of the most important and frequently noted aspects of honor as an ethical system is its dependence upon the conventions and practices of a defined social group.<sup>95</sup> Honor is not just integrity, in the

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89. Krause, *supra* note 14, at 64.

90. Edmund S. Morgan, *The Price of Honor*, N.Y. Rev. of Books, May 31, 2001, at 36.

91. Krause, *supra* note 14, at 97-98.

92. The allusion is to Simon, the most enthusiastic supporter of a style of legal ethics that encourages acting according to moral principles, even in cases in which the legal rule would require a contrary action. See William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 Colum. L. Rev. 421 (2001).

93. Wyatt-Brown, *supra* note 14, at 460.

94. *Id.* at 369, 442, 458, 463.

95. Greenberg, *supra* note 14, at 7-9; Miller, *supra* note 14, at ix, 110-11; Stewart, *supra* note 14, at 22-24, 41, 54, 84, 124; Wyatt-Brown, *supra* note 14, at 22, 34, 113-14, 357, 369, 421; Peristiany, *supra* note 14, at 9-10; Robert F. Cochran, Jr., *Honor as a Deficient Aspiration for “The Honorable Profession”: The Lawyer as Nostromo*, 69 Fordham L. Rev. 859 (2000); Pitt-Rivers, *supra* note 51, at 22, 38; Eugen Weber, *The Ups and Downs of Honor*, Am. Scholar, Winter 1999, at 79, 80; 7 Oxford English Dictionary, *Honour*, at 358 (1989) (defining “code of honour” as “the set of rules and customs which regulate the conduct of some particular class of persons according to a conventional standard of honour” (emphasis added)); James Bowman, *Whatever Happened to Honor?*, American Enterprise Institute, Bradley Lecture Series (June 10, 2002), available at <http://www.aei.org/bradley/bl020610.htm> (last visited Aug. 13, 2002).

One of the dissenters from this view is Sharon Krause, who argues that a person can be honorable through “forceful assertion of self-respect in the absence of

sense of living up to one's own moral commitments,<sup>96</sup> nor is it equivalent to moral virtue, although there can be a community in which virtuous behavior becomes the foundation for a person's honor.<sup>97</sup> Bertram Wyatt-Brown appropriately refers to the "tyranny of the community,"<sup>98</sup> which was the final arbiter of moral disagreement. It is true that a community might recognize as honorable people who challenge its conventions—that is, there might be a meta-convention that permits occasional dissent. Thomas Shaffer may be correct that the fictional Atticus Finch is a man of honor as well as a prophet, who challenges the community to live up to its ideals.<sup>99</sup> But Finch-type characters are rare, and the more likely response to ethical criticism is described by Wyatt-Brown, who wrote about the criticism of slavery in the South: "Any forthright animadversions about a particular case . . . threw doubt on the critic's loyalty to community values."<sup>100</sup> The connection between honor and slavery must give anyone pause who seeks to rehabilitate the old ethics of honor.<sup>101</sup>

Sharon Krause struggles mightily to preserve the capacity of honor to ground resistance to state tyranny while simultaneously purging the concept of its association with inequality and oppression, particularly its historical associations in the United States with slavery and segregation. She is correct that honor is compatible with pluralism, and that sub-communities within a national society may recognize distinctive conceptions of honor that may facilitate resistance to government power.<sup>102</sup> She wishes very much, however, to deny that a

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public esteem." Krause, *supra* note 14, at 157. Her strong desire to rehabilitate honor as an interest capable of motivating challengers to state power apparently caused her to discount the overwhelming weight of historical and anthropological evidence, which is summed up well by William Ian Miller:

[I]n an honor-based culture there was no self-respect independent of the respect of others, no private sense of "hey, I'm quite something" unless it was confirmed publicly. . . . Your status in this group was the measure of your honor, and your status was achieved at the expense of the other group members who were not only your competitors for scarce honor but also the arbiters of whether you had it or not.

Miller, *supra* note 14, at 116.

Another dissenter is Stanley Hauerwas, who argues that honor is more a quality of character than social recognition, and that acting honorably may require us to act against societal standards, but Hauerwas is a theologian, and he is construing the discussion of honor in Karl Barth, who emphasizes that humans can only participate in God's honor. See Stanley Hauerwas, *Dispatches from the Front: Theological Engagements with the Secular* 58-79 (1994).

96. Stewart, *supra* note 14, at 51.

97. *Id.* at 46-47.

98. Wyatt-Brown, *supra* note 14, at 357.

99. Thomas L. Shaffer, *The Gentleman in Professional Ethics*, 10 Queen's L.J. 1, 15, 20-21, 28-31 (1984).

100. Wyatt-Brown, *supra* note 14, at 421.

101. *Id.* at 16.

102. Krause, *supra* note 14, at 98, 118-19.

pernicious code of conduct recognized by, for example, a street gang or white supremacists, is a conception of honor.<sup>103</sup> Instead, she places great reliance on Tocqueville's suggestion that a society without hereditary class distinctions will recognize honor norms that approximate universal principles of human rights.<sup>104</sup> Southern honor was a corruption of the ethics of honor, because it was reactionary and rank-conscious rather than republican, "asserted itself through mastery of others" (to understate the connection with slavery), and had a tendency to degenerate into a mere competition for public recognition, rather than a public-spirited desire to win glory as well as to serve the common good.<sup>105</sup> But preoccupation with external indications of status is exactly what distinguishes honor from an ethical system that emphasizes virtue, character, conscience, or the purity of will. Krause is correct, I think, to admit that "honor is not always admirable, because it may serve deeply unjust principles" and that honor is an incomplete account of a good society, because it is not directly connected to universal principles of rights, equality, or justice.<sup>106</sup> She argues that the problem with honor in the antebellum South was not only that it was illiberal, but that it was permitted to spill out from its proper domain and influence other activities, such as judging, that should have been conducted according to impartial ethical norms.<sup>107</sup> Thus, the only role for honor should be to motivate officials, like judges and lawyers, to comply with the dictates of impartial reason.

Krause's revisionary approach inverts the relationship between moral norms and the community. In her view, honor is a prop or a backstop that simply provides motivation to do the right thing. Honor in a liberal democracy ought to be "tied to universal principles of right rather than to concrete codes of conduct applicable only to a particular group."<sup>108</sup> Of course this would be a good thing, but there is nothing intrinsic in the concept of honor that makes it likely that it will be connected with virtue or justice. Honor is conferred by the community—it is contingent upon whatever happens to be valued in that time and place. Some cultures might value physical strength, courage, and other martial virtues, while in others it may be that "power and respect gravitate to sharp-witted men with self-confident, independent personalities."<sup>109</sup> As it happens, the founding generation

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103. See generally *id.* at 99, 107. For a discussion of honor in urban gangs, see Elijah Anderson, *Code of the Street: Decency, Violence, and the Moral Life of the Inner City* (1999).

104. Krause, *supra* note 14, at 107 (citing Tocqueville, *supra* note 58, at 623).

105. *Id.* at 120-24.

106. *Id.* at 127.

107. *Id.* at 127-28.

108. *Id.* at 107; see also *id.* at 73, 99, 129, 139 (discussing how "reverence for the right codes can be a powerful engine of reform" (emphasis added)).

109. Stewart, *supra* note 14, at 142.

in the United States, and successive moral leaders, such as Abraham Lincoln, Frederick Douglass, and Martin Luther King, Jr., were committed to the values of the Declaration of Independence.<sup>110</sup> From the standpoint of honor, however, these values cannot be judged or criticized, they simply *are*. In other words, honor cannot underwrite a critical morality that stands apart from social conventions.

Indeed, honor may make the critical project of grounding morality on human dignity and equality more difficult, because of its preoccupation with status, distinction, glory, and other qualities that tend to be distributed unequally among persons.<sup>111</sup> *Conceptions* of honor vary considerably from one culture to another, but one of the constants in the definition of the *concept* of honor is inequality—some people simply have more of it than others—and this feature of the concept proves to be an awkward fit with democracy. It is true that even a democracy requires elites, and there have been no shortage of scholars, from Tocqueville to Kronman, who equate lawyers with an American aristocracy. In this sense, the ethics of honor are compatible with the regulation of the legal profession in a democracy. But the recognition of lawyers as an elite class is obviously different from Krause's argument that honor is a covertly progressive notion.

## II. LOOKING AROUND: THE NONLEGAL REGULATION LITERATURE

It would be attractively symmetric to frame this discussion around a Janus image, looking back and looking forward, but in fact the study of extra-legal regulation is thriving, perhaps even booming, right now. In this section, I would like to consider briefly the structure of a system of nonlegal regulation that might be employed to control activities in industry or social groups outside the domain of law. In order for a given structure to be considered a regulatory scheme, as opposed to a system of etiquette or some less substantial set of social expectations, a cluster of norms "must provide for responses sufficiently forceful (1) to clearly characterize offending behavior as unlawful, (2) to confirm the norm in the face of its violation, and (3) to prevent, deter, correct, or effect whatever other sanctioning goals there may be."<sup>112</sup>

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110. Krause, *supra* note 14, at 140, 146-47, 158, 173-74.

111. See Greenberg, *supra* note 14, at 7, 62; Wyatt-Brown, *supra* note 14, at 345; Peter Berger, *On the Obsolescence of the Concept of Honor*, in *Revisions: Changing Perspectives in Moral Philosophy* 172 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983).

112. Reisman, *supra* note 10, at 26. For Reisman, perhaps because he is a scholar of international law, which is constantly having to prove its credentials as "real" law, it is important that these criteria pick out a system of *law* as opposed to non-law. See *id.* at 13. As indicated in the text, however, I am willing to accept that a great deal of the regulation of an industry can be nonlegal, in the sense that *judicially-enforceable*

I will distinguish mechanisms of social control on two dimensions. The first is legal/nonlegal, which refers to the extent to which a system of norms relies on legally enforceable agreements (as in contract law) or legally enforceable noncontractual rights (tort and statutory regulation). The second is formal/informal, which indicates the extent of articulation, specificity, explicitness, and conscious efforts at systematizing that are exhibited by a scheme of regulation.<sup>113</sup> A nonlegal system may be highly formal, as in the private commercial law governing the cotton and diamond industries, or it can be relatively informal, such as the reputational sanctions that lawyers use to control deviant behavior in civil discovery practice. Conversely, a legal system may be informal, in its reliance on vague factors such as the reputation of one of the parties or the parties' past dealings, despite the presence of judicially enforceable penalties.

#### A. *What Are Nonlegal Sanctions?*

Empirically-minded legal scholars have long noticed that participants in certain markets or activities rely on commitments that are not legally enforceable—banks extend credit on the basis of oral representations not embodied in the loan agreement; manufacturers and suppliers deal on the basis of an oral promise or a handshake; and lenders take the reputation of merchants into account when valuing their collateral.<sup>114</sup> Despite appearances, these transactors do not go unprotected; they employ “nonlegal,” “informal,” and “noncontractual” methods to ensure performance. Some of these regulatory structures are quite elaborate, such as the private legal systems described by Bernstein. In the cotton industry, for example, transactions are governed by written agreements, and disputes are handled by arbitral tribunals, which make decisions based on precise, industry-specific definitions of key contractual terms.<sup>115</sup> In other industries, this complexity is absent, and the protection for parties to transactions is a matter of dealing with transactional partners who are known to be reliable—“[w]e can trust old Max,” as Stuart Macaulay puts it.<sup>116</sup> It is nevertheless appropriate to describe old Max's reputation as part of a regulatory structure, because it is the basis for certainty and stability in transactions. Indeed, transactors often prefer

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remedies do not attach to the violation of a given norm. Whether the presence of an authoritative decisionmaker is essential to something being a scheme of law is not important for my purposes.

113. See Bernstein, *Cotton*, *supra* note 8, at 1748-52; Charny, *supra* note 8, at 378 n.13, 399-400, 409-12.

114. Bernstein, *Diamond*, *supra* note 8, at 154-55; Charny, *supra* note 8, at 376-77; Macaulay, *Non-Contractual Relations*, *supra* note 9, at 58.

115. Bernstein, *Cotton*, *supra* note 8, at 1725, 1732-33.

116. Macaulay, *Non-Contractual Relations*, *supra* note 9, at 58-60.

to rely on old Max, rather than the legal process, to ensure predictability.

Although Bernstein appreciates the systematicity of private ordering, and likens the cotton and diamond industries' network of written agreements and arbitral tribunals to a parallel legal regime, she is also well aware of the informal sanctions that maintain stability in these industries. For example, she confirms Macaulay's finding that reputation is a critical asset to merchants in a relatively small community.<sup>117</sup> What is even more noteworthy, in light of our project of looking back at the ethics of honor, is the extent to which reputational considerations in repeat-dealing transactions begin to approximate a full-scale honor system. As Bernstein observes, in the cotton industry, "a transactor's sense of self-esteem, his position in the community, and his social connections were intertwined with his business reputation, making breach of contract something that would hurt not only his business prospects but also his standing in his social community."<sup>118</sup>

The relationship between one's public persona (here, business reputation), standing in the community, and perceived moral character is one of the most salient features of the ethics of honor, and is duplicated in this modern business community. In this case, the honor code recognized by the relevant group includes norms that make the commercial transactions among cotton merchants efficient. Promptly paying debts, complying with one's commitments (not "lay[ing] down" on a contract), and being flexible in dealings and willing to renegotiate contracts when circumstances change, are all highly valued in the community.<sup>119</sup> This is similar to the practice in Bedouin society of using the honor of an elder, respected member of the community to guarantee obligations.<sup>120</sup> If the obligor defaults, the obligee can threaten to "blacken" the honor of the guarantor, and this threat almost always results in immediate payment.<sup>121</sup>

Bernstein recognizes the overlap between modern systems of nonlegal sanctions and the culture of honor, not surprising in an insular, regionally-concentrated community such as the cotton industry. Significantly, the diffusion of honor norms throughout the culture meant that even one-shot transactions benefited from the norms of fair dealing that were encouraged by the honor code:

In the Old South, the culture of honor was strong. "Laying down on a contract" or violating the maxim "my word is my bond" would result in social as well as economic ostracism. As a consequence, *even in transactions between strangers, each transactor had a well-*

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117. Bernstein, *Cotton*, *supra* note 8, at 1745-49.

118. *Id.* at 1749.

119. *Id.* at 1748-49.

120. Stewart, *supra* note 14, at 93-94.

121. *Id.* at 91-92.

*founded reason to believe that if he acted honorably (that is, cooperatively), his transacting partner would do the same.*<sup>122</sup>

A community with widely shared norms can be policed more easily, because deviation from these norms can be easily recognized and the offender socially and economically isolated.<sup>123</sup> (Robert Putnam draws a similar distinction between specific expectations of reciprocity, which exist on a relationship-by-relationship basis, and a society characterized by general norms of reciprocity and trust.<sup>124</sup>) The result of generally diffused norms of cooperativeness is that, instead of relying on cumbersome formal methods such as contracts, parties to a transaction could expect people with whom they dealt to cooperate. The potential transaction cost savings is significant.

The overlap with the ethics of honor points to a significant precondition for, and limitation on, the use of nonlegal sanctions, particularly those in which reputation is critical to the functioning of the sanction. Reputation-based sanctions tend to work best in small, close-knit, geographically isolated, and homogeneous communities.<sup>125</sup> The reasons are several. First, a group must be small enough that its members can observe one another, generally through face-to-face interactions.<sup>126</sup> If the group is sufficiently large, most members will not learn of a breach of the norms of cooperation by one individual. Second, it must be possible to identify deviation from prevailing norms of cooperation, which might be difficult if there are a number of reasonable approaches to a problem that recurs in an industry. Bernstein reports that because of the volatility of cotton prices, dealers are expected to show some flexibility when circumstances change,<sup>127</sup> but one can imagine a different norm, in which buyers and sellers are held to the negotiated price, on the grounds that volatile prices tend not to disadvantage either buyers or sellers as a group, so short-term losses will come out in the wash over time. There would be nothing inherently sleazy or opportunistic about a party to a transaction adopting this attitude; it just happens to be contrary to the prevailing industry norm of flexibility. If the cotton industry were sufficiently heterogeneous, though, it would be difficult for a single stable norm to develop, and for all participants in the market to learn of it. The result would be difficulty in reading a particular act of sticking with the contract price as either uncooperative behavior or compliance with an alternative norm.

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122. Bernstein, *Cotton*, *supra* note 8, at 1764-65 (emphasis added).

123. *Id.* at 1781-82.

124. Putnam, *supra* note 6, at 20-21.

125. Bernstein, *Cotton*, *supra* note 8, at 1749-50; Bernstein, *Diamond*, *supra* note 8, at 140; Charny, *supra* note 8, at 412; Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. Legal Stud. 349 (1981).

126. See Setear, *supra* note 47, at 617.

127. Bernstein, *Cotton*, *supra* note 8, at 1746-49.



In an example I like to cite of this phenomenon applied to lawyers, the chair of the ABA Ethics Committee was asked whether lawyers could ever lie. No, he replied, it would be “ungentlemanly, unlawyerlike, and wrongful.”<sup>128</sup> But then, when asked about whether a lawyer might misrepresent his client’s settlement authority or instructions, he backtracked: “Oh, . . . That’s different. . . . [That’s] tactics.”<sup>129</sup> One could imagine a community, perhaps all members of the fanciful “National Association of Honest Lawyers,”<sup>130</sup> in which lying in settlement negotiations was considered ungentlemanly. More to the point, one could imagine lawyers from these different communities interacting, and being unsure of what is the gentlemanly thing to do. Consider a different example—secretly taping phone calls with the consent of one of the parties (generally the lawyer, investigator, or client). One state bar ethics committee said this practice “offend[s] a sense of honor.”<sup>131</sup> Regulatory authorities in other jurisdictions find nothing dishonorable about it.<sup>132</sup> Despite the deployment of the terminology of honor, there is plainly no agreement on the honorable thing to do. These examples show that only in a small enough group, in which individuals deal with one another frequently, is it likely that a single stable norm (either approving or prohibiting lying in settlement negotiations, or permitting or prohibiting surreptitious taping) will emerge.

The second reason that nonlegal sanctions tend to flourish in small communities is that information regarding reputation must be transmitted, and this generally requires personal communication. Banks which loan to cotton merchants report that they insist on getting to know the borrowers personally, in order to assess their experience and business ethics;<sup>133</sup> however, this kind of investigation would be prohibitively expensive in a large national market. Similarly, in order for a community to punish unethical but profitable behavior—opportunistic breaches, in other words—other potential transactors must learn of the breaching party’s actions so that they can protect themselves by demanding enforceable contractual guarantees of performance, or perhaps additional compensation for the heightened risk of breach.<sup>134</sup> In a large, impersonal marketplace,

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128. Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* 345 (2d ed. 1998).

129. *Id.* (quoting Jethro K. Lieberman, *Crisis at the Bar* 32 (1978)).

130. See John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, “Lawyer Honesty” and Public Trust in the Legal System*, 20 *Pace L. Rev.* 93 (1999).

131. See Maine Prof’l Ethics Comm’n of the Bd. of Overseers of the Bar, *Formal Op.* 168 (Mar. 9, 1999).

132. See A.B.A. Comm. on Ethics and Prof’l Responsibility, *Formal Op.* 01-422 (June 24, 2001) (citing cases and ethics opinions).

133. Bernstein, *Cotton*, *supra* note 8, at 1747-48.

134. Charny, *supra* note 8, at 413.

future transacting partners may have no way to learn of past opportunistic behavior, but in a small, geographically concentrated industry, “[m]ost [transactors] know of each other or can call someone that is in the region to verify some information on a person/firm they are considering doing business with.”<sup>135</sup>

Unfortunately, the very conditions that have led to the increased legalization of the practice of law reduce the likelihood that nonlegal regulation will be effective in many cases. Although there are certainly small markets like Charleston, South Carolina (the subject of a recent paean to nonlegal regulation in the ABA Journal<sup>136</sup>), and specialized subcommunities such as the bankruptcy and maritime bars,<sup>137</sup> in which the lawyers know each other personally, a great deal of civil litigation occurs among lawyers who are strangers to each other. As one of the lawyers interviewed for the ABA Litigation Section study put it:

[T]he practice has changed because of the tremendous influx of lawyers in the last twenty years. In [earlier years] everybody knew literally everybody who were trying cases in a particular city and all the judges knew all the lawyers who regularly practiced. It was much more intimate than the practice is today. There were very few lawyers that you had to worry about, and *people told you things* about them if you did. That is not the case today, I am sorry to say.<sup>138</sup>

This lawyer was making a point about the flow of information relating to reputation when he said “people told you things,” and in this lawyer’s opinion it is the increasing size of the bar that currently makes it impossible to learn about the character of other lawyers. Because of the increasing size of firms, the proliferation of branch offices, and the influx of lateral hires at firms, it may even be difficult for lawyers *in the same firm* to keep an eye on each other.<sup>139</sup> This is a very different situation from that described by a Charleston practitioner, who said that “[m]ost of the lawyers in Charleston know each other,” and from where branch offices operated by large law firms are rare.<sup>140</sup>

Thus, it is difficult to generalize about the usefulness of nonlegal sanctions as a response to unethical behavior. The practice setting can

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135. Bernstein, *Cotton*, *supra* note 8, at 1752 (quoting Email from Association Administrator, to Mary LaBrec (Nov. 15, 2000)); *see also* Charny, *supra* note 8, at 418.

136. Margaret Graham Tebo, *Law in the Low Country*, A.B.A. J. (Sept. 2001), at 40.

137. One lawyer interviewed for the ABA Litigation Section study believed that the local medical-malpractice bar had developed a set of shared expectations about discovery practice because of its small size and the repeated interactions of the lawyers with each other. Nelson, *supra* note 30, at 797.

138. *Id.* at 783 (emphasis added).

139. *Id.* at 787; Sarat, *supra* note 48, at 825-26.

140. Tebo, *supra* note 136, at 42.

make a great deal of difference, as law students seem to appreciate intuitively. In a well known discussion problem from a leading professional responsibility casebook, the lawyer has an opportunity to exploit her adversary's ignorance and obtain dismissal with prejudice of the adversary's lawsuit, by agreeing to stipulate to an extension of time to file an amended complaint, when the plaintiff was required to seek court approval for the schedule change.<sup>141</sup> Each time I discuss this problem, a student generally observes that if the lawyer took advantage of her adversary's mistake, the adversary would be sure to retaliate if they had dealings in the future (in fact, the problem specifies that the two lawyers have been adversaries "now and again"), and would certainly put out the word to other lawyers that "Ms. Niceperson" was not to be trusted when she intimated that she was willing to modify the court schedule.<sup>142</sup> Generally, however, another student responds that this would be well and good in (say) Rockbridge County, Virginia, but Ms. Niceperson may be able to get away with it in New York or Chicago. I caution the students that even in larger legal markets there are smaller subcommunities, in which the information-transmission mechanisms are pretty efficient, and in which it is likely that two lawyers will be matched up on a case in the future. It is true, however, that in practices which are nationwide in scope (such as mass-tort litigation), the lawyers are very unlikely to be repeat players with respect to one another, so the prudential arguments against Ms. Niceperson, based on nonlegal sanctions, are less likely to be persuasive.

### B. *Advantages of Nonlegal Regulation*

There are a number of reasons why nonlegal regulation can be superior to the legal system in many cases.

#### 1. Sensitivity to Context

"[N]onlegal decisionmakers can enforce commitments that judges could not apply with any degree of . . . consistency."<sup>143</sup> Studies of nonlegal regulation contain numerous examples of conduct that is difficult to define with the precision that would be necessary to legal

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141. See Stephen Gillers, "Ms. Niceperson," in *Regulation of Lawyers: Problems of Law and Ethics* 93-94 (6th ed. 2002).

142. Cf. Robert E. Keeton, *Trial Tactics and Methods* 4-5 (2d ed. 1973). Keeton, who is now a federal district court judge, observes:

From a long range point of view, as distinguished from concern with the immediate case only, you have an interest in avoiding customary use of methods designed to win cases on grounds that may be regarded as unfair, though legal. A reputation for this type of practice becomes a handicap to you in representing your clients in future cases . . . .

*Id.* at 4.

143. Charny, *supra* note 8, at 404.

regulation. For example, the vagaries of the cotton market, including weather and the conditions under which cotton is stored and shipped, make it difficult to know whether a shipment of nonconforming goods was inadvertent or intentional; parties to an enforceable contract would find it exceedingly difficult to specify conditions under which a nonconforming shipment should be a material breach, as opposed to cases in which the purchaser should attempt to negotiate an adjustment.<sup>144</sup> Similarly, because of the volatile nature of the relevant markets, it is difficult to value *ex ante* the lost business opportunities that would be appropriate as liquidated damages in an agreement for the shipment of diamonds.<sup>145</sup> The evaluation of the quality of diamonds and a shipment of cotton also tends to be highly subjective; in the case of cotton, for instance, there are over forty factors that go into the description of a single lot.<sup>146</sup> The same phenomenon may be observed in the legal profession, and in our case study of civil discovery. Participants in the ABA litigation section's study of litigation ethics defined abusive discovery using terms such as "burying" the opponent in paper, "mischievous" discovery requests, bullying in depositions, resorting to "sharp practice," being "aggressive," or playing "hardball."<sup>147</sup> The lawyers' responses are reminiscent of Justice Stewart's "I-know-it-when-I-see-it" definition of obscenity; indeed, one of the study authors reports that "obnoxious, obstructive litigators" become known simply as "assholes."<sup>148</sup>

One interesting finding in the ABA study is that all the lawyers could identify "assholes" reliably, even though they had a much harder time stating with precision what conduct justified that label.<sup>149</sup> Their reasoning tends to appear conclusory from the standpoint of someone who is not a participant in the litigation. For example, here is one summary of the rules of acceptable discovery tactics: "[I]t is okay to use tactics that lead opponents down dead-ends, to delay in order to raise costs, and to use discovery to 'harass' opponents. But all of this must be done without name calling, without doing anything dishonest, and in the name of a 'plausible' position or goal."<sup>150</sup> The definitions of dishonesty and plausible positions are the criteria for determining whether a move in the discovery game is unethical, but lawyers generally were not able to give precise definitions of these

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144. Bernstein, *Cotton*, *supra* note 8, at 1775.

145. Bernstein, *Diamond*, *supra* note 8, at 134-35, 148-50.

146. Bernstein, *Cotton*, *supra* note 8, at 1745-46; Bernstein, *Diamond*, *supra* note 8, at 118.

147. Nelson, *supra* note 30, at 774-75.

148. *Id.* at 775 ("The transcripts from that point on are littered with mentions of 'assholes.'").

149. For a sophisticated discussion of this kind of reasoning and a guarded endorsement of it in judicial opinions, see Paul Gewirtz, *On "I Know It When I See It,"* 105 Yale L.J. 1023 (1996).

150. Sarat, *supra* note 48, at 822.

terms. When another section of the ABA attempted to set out standards for professionalism in litigation,<sup>151</sup> the result was similarly conclusory:

In litigation proceedings I will agree to *reasonable* requests for extensions of time or for waiver of procedural formalities [e.g. service of process] when the *legitimate* interests of my client will not be adversely affected.<sup>152</sup>

I will refrain from engaging in *excessive and abusive* discovery, and I will comply with all *reasonable* discovery requests.<sup>153</sup>

In depositions and other proceedings, and in negotiations, I will conduct myself with *dignity*, avoid making *groundless* objections and refrain from engaging in acts of *rudeness or disrespect*.<sup>154</sup>

I will not serve motions and pleadings on the other party, or his counsel, at such a time or in such a manner as will *unfairly* limit the other party's opportunity to respond.<sup>155</sup>

In civil matters, I will stipulate to facts as to which there is no *genuine* dispute.<sup>156</sup>

The bottom line is not that lawyers cannot recognize unethical conduct, but that spotting discovery abuse and other misbehavior in litigation is a matter of "complex discretionary judgment" that cannot be reduced to a formula or algorithm.<sup>157</sup> For this reason, it would be difficult to create a regime of legal rules to regulate abusive litigation.

151. See *Lawyer's Creed of Professionalism*, A.B.A. Sec. of Tort & Ins. Prac. (1988 annual meeting), reprinted in A.B.A. Compendium of Prof'l Responsibility Rules and Standards 366 (2001).

152. *Id.*, Standard B(3) (emphasis added).

153. *Id.*, Standard B(6) (emphasis added).

154. *Id.*, Standard B(8) (emphasis added).

155. *Id.*, Standard B(9) (emphasis added).

156. *Id.*, Standard C(9) (emphasis added).

157. Gordon, *supra* note 48, at 712-13; Gilson & Mnookin, *supra* note 7, at 517-18. Gordon was able to construct a hierarchy of unethical conduct in discovery, from the most to least serious, but at each step there are evaluative terms (like "unjustified") that cannot be defined *ex ante* but which are easily recognized by the parties to litigation. Here is Gordon's hierarchy:

(1) plain dishonesty, such as making representations about facts that turn out to be untrue or promises about future conduct that are broken; (2) unjustified 'hardball,' such as threatening sanctions without plausible cause or constant interruptions of questioning or instructions to witnesses; (3) gratuitous uncooperativeness, such as refusing reasonable requests for rescheduling or sending briefs by ordinary mail instead of messenger; and (4) tactical unpleasantness or bad manners, such as screaming, insulting, patronizing junior or female lawyers, and macho posturing.

Gordon, *supra* note 48, at 713. This is also a contestable ranking. For instance, one might put some macho posturing and patronizing female lawyers in depositions in the second category, because it has the same disruptive effect as constantly interrupting the questioning lawyer. See, e.g., *Mullaney v. Aude*, 730 A.2d 759 (Md. Ct. Spec. App. 1999).

Bernstein also observes that nonlegal sanctions are preferable to legal ones where legal sanctions would require the aggrieved party to rely on non-verifiable information. Information is “verifiable” if “from an *ex ante* perspective transactors would find it worthwhile to prove [it] to a third-party in the event of a dispute.”<sup>158</sup> For example, in financial markets the participants are attuned to impressionistic information, such as market trends, that would be exceedingly expensive or difficult to prove after the fact in an in-court proceeding.<sup>159</sup> The reason why judges tend to abstain from deciding discovery disputes may be that the information at issue is costly for the parties to prove to the court. For example, if the issue in a motion to compel is whether one of the parties has complied fully or “reasonably” with a request for production, the judge would be required to read carefully the request, the responding party’s objections, and the follow-up correspondence between the parties, as well as possibly reviewing produced documents and privilege logs, and potentially inspecting unproduced documents *in camera*. This task tends to be unpleasant, time-consuming, and frustrating.<sup>160</sup> It is also difficult to specify in advance the standards that a judge should apply because of the situation-specific nature of so many discovery norms. As one of the reporters of the ABA study wrote:

The answer to almost every question [about discovery practices is] it “depends.” Aggressiveness generally is inappropriate, unless the war was initiated by the other side. Hardball usually is inappropriate unless there is a specter of mischievous plaintiffs’ lawyers waiting to use the information from discovery for other suits.<sup>161</sup>

As a result, from an *ex ante* perspective, it appears less efficient to construct formal, legally enforceable rules that regulate discovery practice, as compared with allowing the parties to fight it out for

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158. Bernstein, *Cotton*, *supra* note 8, at 1760.

159. Charny, *supra* note 8, at 415. Compare the discussion of queuing behavior in Reisman, *supra* note 10, at 76-77, 82-83. Everyone who has ever stood in a line recognizes some of the implicit norms associated with queuing, such as the “unit rule” (people may cut in line if they are from the same unit, such as a family), and the “hardship rule” (people may step out of line briefly on the basis of a sufficient hardship, such as an urgent call of nature). *Id.* It would be difficult to define from an *ex ante* perspective all of the rules and exceptions that apply to standing in line. *Id.* For example, not all units count for the purposes of the “unit rule.” *Id.* Family members at an airport almost certainly count (if mom parks the car while dad waits in line with the kids and luggage, for instance), but a group of friends standing in line for tickets to a concert would not fall within the rule. *Id.* Significantly, the people who are actually in line do recognize breaches of the norm, and can sanction the violator using ritualized forms of protest, which both shame the violator and announce to others that breaches of order will not be tolerated. *Id.* at 42-43, 86-87.

160. Gilson & Mnookin, *supra* note 7, at 518-19.

161. Nelson, *supra* note 30, at 780.

themselves, using some of the nonlegal sanctions described in the next section.

## 2. Reduced Planning Costs

According to Stuart Macaulay, the businesspeople he studied opted out of the legal system in part to avoid red tape—that is, to minimize transaction costs.<sup>162</sup> In some cases legal regimes can be modified to reduce planning costs. Where sales of goods are concerned, for example, the UCC does not require much in the way of a writing to memorialize the agreement.<sup>163</sup> Similarly, private legal systems can reduce transaction costs by providing a menu of pre-drafted contractual provisions that can be plugged into an agreement as needed.<sup>164</sup> Planning costs are even lower in informal systems, which are not parallel private legal orders, but systems of tacit understandings, relationships of reciprocal trust, and the domain of nonlegal sanctions such as gossip and retaliation. An agreement based on old Max's word does not need to be reduced to writing and backed up with either state-based or private formal remedies. Rather, the party dealing with Max can rely on Max's reputation for fulfilling his commitments.

In litigation, one might structure dealings with opposing counsel using costly legal methods such as court-approved schedules and pretrial orders, formal discovery requests as provided for by the rules of civil procedure, and confirmatory letters which create a paper trail if judicial intervention is subsequently required. There is a cost to all this, which is borne directly by the client if the lawyer is billing by the hour, and indirectly by the lawyer in the form of the hassle and aggravation associated with spending time on administrative matters, rather than thinking about the substance of the litigation. (This is not aggravating for all lawyers—every big firm seems to have some members who revel in the byzantine complexities of case management.) The alternative would be a world in which the parties trusted each other not to take advantage of the absence of procedural formalities. In other words, instead of seeking a protective order from the court limiting the length of depositions, the parties could simply agree, explicitly or tacitly, not to waste time on pointless questioning or objections in depositions. If lawyers in a small community were repeat players with respect to one another, they could probably decide in advance how much formality was required in dealing with opposing counsel. That is one finding of Gilson and Mnookin's study of the elite matrimonial bar in California.<sup>165</sup> When two lawyers with known

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162. Macaulay, *Non-Contractual Relations*, *supra* note 9, at 58.

163. Charny, *supra* note 8, at 404.

164. Bernstein, *supra* note 8, at 1725, 1740-43; Charny, *supra* note 8, at 379.

165. Gilson & Mnookin, *supra* note 7, at 541-46.

cooperative dispositions were matched up in a case, they were able to exchange information informally, without using formal discovery devices.<sup>166</sup>

Similarly, one of the lawyers in the maritime personal-injury group of my law firm reported that he would conduct discovery from the plaintiff's attorney by calling up the other lawyer and saying, "Hey, it's *X*—you know what I want on the *A v. B* case." The documents (generally medical records and the like) would arrive the next day by messenger. Significantly, the group of family law practitioners studied by Gilson and Mnookin, and the maritime bar in Seattle were small; in addition, divorces involving wealthy families and seaman's personal injury cases are sufficiently idiosyncratic that they could be handled effectively only by highly specialized lawyers. If these conditions are satisfied, however, the result is a notable reduction in the transaction costs associated with conducting litigation.

Unwritten codes of conduct or social norms can also reduce upfront costs by providing a way to bring the relationship between the parties back to a cooperative footing, or deter uncooperative behavior in the first place. Michael Reisman provides an example that is familiar to litigators: A more experienced lawyer was bullying a younger opponent in a deposition and the younger lawyer was unsure how to respond.<sup>167</sup> The latter blurted out something which turned out to be exactly the right form of words to stop the bully in his tracks.<sup>168</sup> (Reisman does not say what the words were, but we can speculate. Perhaps: "Mr. *X*, if you do not stop harassing the witness, I will have no choice but to terminate this deposition and take the matter up with the court.") The inadvertence in the story is amusing, but the more general point is that there are incantations that one may utter to show that one is willing to invoke legal or nonlegal sanctions. As Gilson and Mnookin report, one experienced family lawyer faced by a possible escalation in nastiness by opposing counsel simply said "en garde."<sup>169</sup> This can be an effective response, provided that there are means of retaliation available, which lawyers can credibly threaten to employ.

### 3. Flexibility

As circumstances change, parties to a transaction may wish to modify their relationship without going through the hassle of renegotiating all aspects of the deal. In some industries, flexibility is absolutely necessary because of rapid fluctuations in price, the availability of materials or warehouse space, and so on. One of the

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166. *Id.* at 544.

167. Reisman, *supra* note 10, at 18.

168. *Id.*

169. Gilson & Mnookin, *supra* note 7, at 553.



cotton dealers interviewed by Bernstein summed up the response by merchants to the volatility of the cotton market: "If someone is short of warehouse space, you agree to delay delivery; if someone needs a shipment early, you are ready to go, so you do it."<sup>170</sup> Even where the parties had negotiated a legally enforceable agreement covering a problem that arises, the parties may negotiate a solution as if there never were a contract on point.<sup>171</sup> The reason for this is interesting—a *reputation* for flexibility is essential for a party who wishes to enter into transactions in the future. Thus, informal sanctions, such as loss of reputation, may supplement formal (legal or nonlegal) methods of ordering. As one of Macaulay's interviewees put it, "You don't read legalistic contract clauses at each other if you ever want to do business again. One doesn't run to lawyers if he wants to stay in business because one must behave decently."<sup>172</sup> (Compare the idea that one does not seek police protection when one's honor has been impugned, but rather stands and fights.) Moreover, a person with a reputation for flexibility enjoys the benefits of reciprocity—quite simply, other people will cut you some slack if you have done so for them in the past. In Bernstein's analysis, "even if transactors have to forego the benefits of an occasional profitable breach in situations where attempts to renegotiate fail, doing so is worthwhile so long as they can count on their transacting partner to do the same when the shoe is on the other foot."<sup>173</sup>

In some respects, litigation is like the cotton markets, in terms of the volatility and unpredictability of daily events. Most lawyers do not work only on one case at a time, so there is always a chance that a different matter will suddenly heat up, requiring the lawyer to shift attention away from other cases. Flexibility from opposing counsel is critical here, because it is much less time-consuming simply to call up the other lawyer for a schedule change, instead of seeking judicial relief. Alternatively, circumstances may change by reason of newly discovered evidence, a change in attitude of one of the clients, or some other unexpected development beyond the control of the lawyers. If the relationship between the two lawyers has been proceeding on a cooperative footing, these changes can readily be accommodated between the parties, with little hassle. In contrast, if one of the lawyers has defected from the cooperative relationship, it will be practically impossible for her to secure an inexpensive accommodation to a schedule change. Note also that the opposing lawyer will be better able than a tribunal to detect a pattern of abusive

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170. Bernstein, *Cotton*, *supra* note 8, at 1744.

171. Macaulay, *Non-Contractual Relations*, *supra* note 9, at 61.

172. *Id.*

173. Bernstein, *Cotton*, *supra* note 8, at 1756; *see also* Tebo, *supra* note 136, at 44 (reporting that lawyers in a small, close-knit community do not file motions for default judgments, because "you know it's bound to happen to you sometime").

requests for continuances or schedule changes, and can impose the appropriate sanction, such as the new-found inflexibility in granting procedural accommodations. Because the sanction would follow only upon a recognized breach in the cooperative stance the parties had been taking toward each other, it would be difficult to obtain similar relief from the court. Essentially the party seeking a remedy would be required to prove the nature of the parties' understandings and the way in which the breaching lawyer's conduct deviated from those expectations—an expensive undertaking, and one not likely to be worth the effort.

### III. HOW NONLEGAL AND INFORMAL SANCTIONS MIGHT WORK IN CIVIL DISCOVERY PRACTICE

When considering mechanisms as a basis for the control of lawyers, it is important to differentiate two sources of potential sanctions—other lawyers, on the one hand, and judges or other authoritative decisionmakers, on the other. Lawyers may often be able to impose a sanction on their adversaries, by failing to agree to schedule changes, retaliating with burdensome discovery requests, or filing motions at inconvenient times, although none of these sanctions are legal, in the sense of being backed up with judicial authority. Judges are of course empowered to impose legal sanctions, but there is an important sense in which the exercise of their power can sometimes be informal.<sup>174</sup> Judges often rely on the reputation of counsel or the history of dealing with one of the lawyers when making discretionary judgments. If one lawyer has appeared uncooperative, the judge may rule against her in a discovery dispute, even though the judge would have been inclined to grant a different lawyer a break.<sup>175</sup> Although these sources of

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174. Recall the legal/nonlegal and formal/informal distinctions. See *supra* note 113 and accompanying text.

175. This is the sort of statement that I know to be true, as a former litigator and judicial clerk, but for which it is difficult to provide solid empirical “proof.” For some supporting evidence, see Keeton, *supra* note 142, at 4-5 (noting that acquiring a reputation for sharp practice means that “even your more substantial contentions come to be viewed with suspicion by judges familiar with your reputation”). See also “The Rambo Litigator,” *The Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 146 F.R.D. 205, 229 (1992) (the remarks of Judge Marvin E. Aspen); Humbach, *supra* note 130, at 97 (anecdote); Nelson, *supra* note 30, at 790 (recounting a judge's order that justified the result in part on the basis of the judge's conclusion that “Mr. X engaged in a pattern of misconduct from the opening statement through the closing argument”); Tebo, *supra* note 136, at 79 (reporting the account of a local judge who said he would sign anything on an oral representation by a lawyer, but if he ever got in trouble for signing something, he would never again trust that lawyer); R. Robin McDonald, *11th Circuit Judges Rap K & S Over Discovery*, *Fulton County Daily Rep.*, Jan. 18, 2002, available at LEXIS, News Group File (describing how, at oral argument, judges on 11th Circuit panel first sharply criticized the defense lawyers' conduct of discovery, before considering merits of appeal). In the context of business transactional lawyering, see Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *Yale L.J.* 239

sanctions differ, it is possible to make some generalizations about informal and nonlegal sanctions that hold for both judges and lawyers.

### A. *Bonds and Retaliation*

David Charny's article on nonlegal sanctions contains an interesting discussion of reputation bonds. One of the parties to a transaction may enjoy a "relationship-specific prospective advantage" in dealing with another.<sup>176</sup> For example, a one-shot relationship may not be that valuable, but a long-term course of dealing might be quite profitable. Alternatively, one party may require some flexibility from the other in the future (such as delaying a shipment), and therefore is careful herself to show flexibility, in order to build up a reservoir of goodwill.<sup>177</sup> If *A* would benefit from dealing with *B* in the future, and *B* will deal with *A* only if *A* proves to be trustworthy, or if *A* might need something (like flexibility) that *B* can give or deny at her discretion, then *B* essentially controls a valuable asset of *A*. *B* can "forfeit" the asset—the reputation bond—at any time by refusing to deal with *A* in the future. The value of the bond is the value of the future dealings with *B*. As Bernstein recognizes, the value of the bond (and thus the incentive for *A* to continue cooperating) can be increased tremendously by threatening *A* not only with the end of the relationship with *B*, but also with that of other similarly situated transactors, *C* through *Z*. For example, a diamond seller who is not a member of the Diamond Dealers Club has greatly reduced access to the worldwide diamond distribution network, and would therefore be at a disadvantage in the market.<sup>178</sup> The value of the "bond" posted by a diamond seller is increased by the centrality of the Club to the diamond market. Similarly, certain industry groups in the cotton market can expel members for noncompliance with the association's rules, which would result in economic catastrophe for the expelled member.<sup>179</sup>

Expulsion from an industry association is a more formal sanction than *B*'s refusal to deal with *A*, but, as Bernstein observes, there are informal sanctions at work in these industries as well. For example, the geographic concentration of cotton dealers on Front Street in Memphis facilitates gossip, so that unethical conduct by one merchant quickly becomes common knowledge in the relevant community.<sup>180</sup> Gossip and a bad reputation can have a direct economic impact in the

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(1984) (describing how parties to a transaction may be willing to accept the representation of a lawyer with a good reputation, without doing duplicative investigation).

176. Charny, *supra* note 8, at 392-94.

177. See Macaulay, *Non-Contractual Relations*, *supra* note 9, at 64.

178. Bernstein, *Diamond*, *supra* note 8, at 119-20.

179. Bernstein, *Cotton*, *supra* note 8, at 1737-39.

180. *Id.* at 1749-52.

cotton industry. Banks, for instance, inquire into the reputation of individual merchants and use that information to set interest rates or decide whether to extend credit; other merchants can similarly refuse to deal with an individual with a reputation for not paying debts promptly, inflexibility, or unwillingness to comply with contractual commitments.<sup>181</sup> Reputation is an extremely serious matter for diamond dealers as well, for similar reasons, as banks rely on the reputation of dealers when valuing collateral for loans.<sup>182</sup> Indeed reputation is taken so seriously that there are mechanisms for dealing with false accusations and malicious gossip, such as a bulletin board in the Club on which dealers can post rebuttals if they feel they have been wrongfully victimized.<sup>183</sup>

There are a number of ways in which lawyers can make and enforce “bonds” in civil litigation. As many observers have recognized, adversary litigation is structured like an arms race or repeated prisoner’s dilemma.<sup>184</sup> Assuming the parties would prefer to keep their costs down, and have small enough agency costs that they are able to prevent their lawyers from “churning” the case to generate billings, there are a number of junctures in litigation in which each party would be better off adopting a cooperative stance with respect to the other. For example, both parties would be better off if there was some flexibility built into scheduling depositions and briefing cycles, or by holding to informally agreed-upon understandings rather than formalizing everything through the court. Sufficiently cooperative parties may even exchange information informally, without resorting to formal discovery methods such as interrogatories and requests for production.<sup>185</sup> If one party defects from the cooperative solution, that defection will impose costs on the other and (we may assume) result in benefits for the defecting party. The other party will almost certainly retaliate, plunging the interaction into the less efficient noncooperative solution. This is familiar from game theory. As Robert Axelrod has shown, when dealing with opposing counsel, the best strategy for lawyers to adopt is called “tit for tat”—cooperate on the first move and continue to return cooperation for cooperation on subsequent moves, but if the other party defects, defect on the next move and all subsequent moves.<sup>186</sup> In fact, some lawyers report that they employ exactly this strategy, feeling out their adversaries for cooperativeness early in the process, for example by

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181. *Id.* at 1745-48.

182. Bernstein, *Diamond*, *supra* note 8, at 154-55.

183. *Id.* at 121 n.10.

184. William H. Simon, *The Practice of Justice* 66-67 (1998) [hereinafter Simon, *Practice of Justice*]; Gilson & Mnookin, *supra* note 7, at 520; Setear, *supra* note 47, at 615-23.

185. Gilson & Mnookin, *supra* note 7, at 544 (reporting that matrimonial lawyers who trusted each other rarely used formal discovery).

186. Robert Axelrod, *The Complexity of Cooperation* 16, 20-21 (1997).

“experiment[ing] with minor agreements with opposing counsel early in a case.”<sup>187</sup>

I have written elsewhere about the tit-for-tat practices surrounding contention interrogatories.<sup>188</sup> Suppose a case is framed by a complaint and answer with dozens of contentions and responses, respectively. In principle, each party could ask the other to provide all the factual support for each averment or response—indeed, the other party has an ethical duty under Rule 11 to conduct a reasonable investigation into these facts, so it seems quite reasonable to make this information discoverable. In practice, however, contention interrogatories are annoying, time-consuming, and expensive. Moreover, because they are easy to evade, litigators generally acknowledge that they produce little useful information. For these reasons, their only function is as a weapon. Both parties would be better off if neither side issued contention interrogatories and generally neither side does, because the adversary almost certainly has the capacity to retaliate in kind. (An exception might be a case with a large, sophisticated firm against a solo practitioner, particularly one inexperienced in federal court practice; in such a case, contention interrogatories would be one way of “snowing” the adversary under a blizzard of paper, forcing that party to settle cheaply.) One way to characterize the retaliatory service of contention interrogatories is as “additional abuse” which further interferes with the discovery process,<sup>189</sup> but an alternative interpretation is that the *possibility* of retaliation actually deters the abusive use of contention interrogatories in the first place.

There is a similar dynamic to other means that lawyers have for annoying one another. A relationship between opposing lawyers on a case may start out cooperatively, in several ways. Lawyers may accept one another’s oral representations at face value, without memorializing them with confirmatory letters, because it is faster and less expensive to rely on oral promises.<sup>190</sup> If one party refuses to honor an oral commitment, however, the future course of dealing between the lawyers will be marked by exceeding attention to formalities, and letters will follow on any phone call. (The purpose of the letters is to make a record of the opposing party’s bad faith, to lay

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187. Nelson, *supra* note 30, at 776; see also Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283, 295 n.44 (1996).

188. Wendel, *Nonlegal Regulation*, *supra* note 49, at 2010 & nn.208-09. For judicial decisions on the use of contention interrogatories, see, for example, *Starcher v. Corr. Med. Sys., Inc.*, 144 F.3d 418, 421 n.2 (6th Cir. 1998); *Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650-52 (C.D. Cal. 1997).

189. Brazil, *Chicago Lawyers*, *supra* note 37, at 250.

190. For a representative anecdote from a Charleston, S.C., lawyer, see Tebo, *supra* note 136, at 44 (“Here, your word is your bond, and if you tell a fellow lawyer that you’re going to do something, nobody feels the need to put that in writing because you know they will do what they say.”).

the groundwork for a future motion for relief from the court.) Similarly, lawyers may cooperate in the sense that each side readily grants requests for continuances, reschedules depositions, and makes other minor procedural accommodations. Each party knows, however, that it may refuse to grant this permission at any time, forcing the other side to approach the court for relief. Although the court may theoretically sanction a lawyer for refusing to cooperate,<sup>191</sup> in practice this hardly ever happens, because a reasonably clever lawyer can always come up with a colorable reason for refusal: "That witness had a scheduling conflict," "It was important to stick with the briefing schedule because the motions cutoff deadline is approaching," and so on. Few judges are inclined to second-guess those sorts of reasons, at least in the absence of a pattern of bad faith conduct by one of the lawyers, and will generally grant the requested relief but not impose additional sanctions. Thus, lawyers can inflict costs on one another by forcing their adversary to file a motion to accomplish a simple change in schedule. Naturally, both sides have this option, and a lawyer who decides to get nasty with the adversary must anticipate that at some point in the case, the shoe will be on the other foot. Reciprocity is the reason that lawyers generally refrain from this kind of gratuitous nastiness, and this dynamic shows that relationship-specific bonding does work well in practice to reduce unethical behavior.

There are a few problems with the threat of retaliation as a means of controlling lawyers. One is that it can be hard to decode ambiguous actions as either aggressive or non-threatening. If the parties are playing tit-for-tat, there is a risk that "one transactor will misclassify an act of cooperation as an act of defection and thereby trigger a series of defections and counter-defections that might well lead to the unraveling of the . . . relationship."<sup>192</sup> Commercial norms in the cotton industry ameliorate this problem in several ways. First, there is a norm of restraint, and not assuming that a nonconforming shipment is a deliberate breach, because "[i]t is widely recognized that two cotton men acting in good faith may well grade a particular lot of cotton differently."<sup>193</sup> Also, owing to the wide variation in cotton

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191. 28 U.S.C. § 1927 (1994). A lawyer is also technically subject to discipline under Model Rule 3.2, but absent extraordinary circumstances, lawyers are hardly ever disciplined for violation of this rule alone. Model Rules of Prof'l Conduct R. 3.2 (2002). The disciplinary cases cited in the annotations to this rule generally involve lawyers who neglect to work on their clients' cases for an extended period of time. See A.B.A., Annotated Model Rules of Prof'l Conduct 307-10 (4th ed. 1999). Sanctions imposed on lawyers for delaying litigation are generally grounded in a rule of civil procedure of the court's inherent power, not Rule 3.2, although courts may refer to the disciplinary rule as an additional norm that reinforces their authority. See *id.*

192. Bernstein, *Cotton*, *supra* note 8, at 1771; see also Gilson & Mnookin, *supra* note 7, at 522 ("In litigation, there are many gray tones between the black and white of [cooperation or defection].").

193. Bernstein, *Cotton*, *supra* note 8, at 1774.

quality due to conditions in transit and storage, cotton merchants tend to pay attention to patterns rather than individual acts, so that one saves up retaliation until a "pattern of frequent bad outcomes leads a transactor to conclude that he is dealing with a defector."<sup>194</sup> In addition, because retaliation imposes costs on the retaliator, it may be inefficient to exact a "tit" for every minor "tat." Rather, being forgiving for a while and then dropping the hammer on a defector tends to be the efficient strategy for cotton merchants.<sup>195</sup>

One way of retaliating for repeated acts of cooperation would be for the aggrieved client to switch lawyers or law firms, from a cooperator to a notorious "gladiator" or Rambo litigator.<sup>196</sup> (I would venture that most lawyers could identify this lawyer or law firm in the market in which they practice.) This is a drastic and very expensive response for the client, however, because of the costs associated with getting the new lawyer up to speed on the case.<sup>197</sup> Thus, the client may put pressure on the existing lawyer to become a gladiator, despite the lawyer's preference to cooperate, and investment in her reputation as a cooperator.<sup>198</sup> Whether the client can insist that the lawyer retaliate is an interesting question of professional responsibility law. Briefly, the Model Rules allocate authority to make decisions respecting litigation on the basis of a distinction between ends and means—the client has the right to make decisions concerning the "objectives of representation," and the lawyer essentially has the right to select the means by which these objectives will be carried out, although she is obligated to consult with the client about tactical decisions.<sup>199</sup> This distinction has never been very helpful, and even the comment to the 1983 version of Rule 1.2(a) admits that a "clear distinction between objectives and means sometimes cannot be drawn,"<sup>200</sup> but the commentary to the revised version of Rule 1.2 does define "means" as equivalent to "tactical, legal, or technical matters."<sup>201</sup> The difficulty is that some tactical or legal decisions, such as foregoing a claim or defense, or refraining from putting on a witness at trial, can make all the difference to the outcome of the case. Should the subject matter of these decisions be characterized as means or ends? In functional terms they are ends, but formally they are means. The Restatement opts for the functional approach, vesting the client with authority over decisions that are similar in significance to accepting an offer of settlement, stipulating

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194. *Id.* at 1775.

195. *See id.* at 1778-79.

196. Gilson & Mnookin, *supra* note 7, at 523, 556-58.

197. *Id.* at 524.

198. *Id.* at 551-53.

199. Model Rules of Prof'l Conduct R. 1.2(a) (1983).

200. *Id.*, cmt. 1.

201. Model Rules of Prof'l Conduct R. 1.2 cmt 2 (2002). This is the so-called "Ethics 2000" version of the Rules.

to a claim or defense, or pursuing an appeal.<sup>202</sup> If the decision to resort to “Rambo” tactics could make the difference between winning or losing a case, the client may have a legal right to make it.

### B. *Gossip*

Bonds work well in repeated interactions, where one party stands to lose a relationship-specific prospective advantage, resulting from the privilege of dealing with the other or the efficiencies of a trusting relationship. They are not much use in one-shot interactions, where the parties do not expect to deal with one another in the future. One of the transactors can defect from the cooperative solution, and the aggrieved party will just have to accept the loss, and will be unable to retaliate against the breaching party within the confines of the bilateral relationship. The aggrieved party does have a means to retaliate, however, if the defecting party is a member of the same relatively small community—namely, “putting the word out on the street” that he has been victimized, so that others in the community will be more cautious in dealing with the defector in the future. Because the defector probably values relationships with other lawyers that are characterized by trust (so that, for example, his oral representations are believed, and not confirmed by follow-up letters), informality, flexibility in scheduling, and tolerance for occasional mistakes, rather than exploiting them, the lawyer who was the aggressor in the earlier relationship will lose a thing of value in a subsequent relationship. Thus, the *threat* of adverse gossip can serve to control uncooperative behavior in a one-shot relationship, where relationship-specific bonding would not be effective. Lawyers in small communities tend to internalize the threat of adverse gossip, and many junior lawyers have heard advice from more experienced practitioners along the lines of, “Don’t say or do anything you would be embarrassed to see reported in the newspaper.”<sup>203</sup>

To return momentarily to our backward-looking perspective, many cultures governed by the ethics of honor recognize a formalized gossiping practice, called “posting,” in which dishonorable conduct by a member of the community may be announced publicly. For example, in Bedouin society, “the dishonor of a man who defaulted after pledging his honor might be marked by the propagation of a defamatory text accompanied by an appropriate picture.”<sup>204</sup> Others in the community would thus be on notice not to accept pledges from the

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202. Restatement (Third) of the Law Governing Lawyers § 22 (2000).

203. See, e.g., Tebo, *supra* note 136, at 43. It is perhaps a measure of the cynicism of large-firm lawyers, or the more aggressive atmosphere of personal-injury litigation, that I heard a somewhat different version of that advice as a junior associate: “Don’t say or do anything that you wouldn’t want to see reported to the judge in an affidavit in support of a motion for sanctions.”

204. Stewart, *supra* note 14, at 119.



posted individual in the future. In the American South, failure to accept a challenge to a duel or dishonorable conduct in the negotiations leading up to a duel or in the duel itself could be dealt with by posting.<sup>205</sup> An example of the colorful language used in posts comes from a dispute between two prominent Virginia politicians in 1807, which culminated in one of the parties putting up handbills on all street corners in Washington reading: "In justice to my character I denounce to the world John Randolph, a member of Congress, as a prevaricating, base, calumniating scoundrel, poltroon and coward."<sup>206</sup> After being posted, a man was no longer deemed a gentleman, and others could ignore his insults or challenges to duel. Similarly, in some professional communities, acquiring a sufficiently poor reputation can result in the ostracism of the offending member, as in the diamond industry where the public posting of reports of contract-breaking can result in the effective expulsion of the offender from the industry.<sup>207</sup>

Remarkably enough, the posting phenomenon has not passed from our public life, and occasionally surfaces in the legal profession. A recent press release by a major law firm may be understood as a modern example of posting. After Latham & Watkins poached a corporate securities partner, Frode Jensen, from Pillsbury Winthrop, Pillsbury issued a remarkably intemperate public statement accusing the lawyer of sexual harassment and laziness, which are ritualistic accusations of dishonor to a modern lawyer, just as surely as allegations of dishonesty and cowardice were to a gentleman in the nineteenth century:

[A]s a result of Latham's press release [announcing the hiring,] Pillsbury Winthrop Chair, Mary Cranston, explained that Mr. Jensen's departure comes on the heels of sexual harassment allegations involving Mr. Jensen and a significant decline in his productivity.

... We investigated the harassment claims, concluded that there was a reasonable likelihood that harassment had occurred and responded with a variety of measures.

... Latham & Watkins did not contact anyone in Pillsbury Winthrop's management in connection with a reference check for Mr. Jensen.<sup>208</sup>

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205. Freeman, *supra* note 14, at 121-23, 172-73.

206. Yarn, *supra* note 77, at 90-91.

207. See Bernstein, *Diamond*, *supra* note 8, at 130-32. Expulsion may also be formal, although still nonlegal, by virtue of the operation of a private legal system. In the cotton industry, for example, trade associations expel members for noncompliance with arbitration awards, and it is necessary to belong to the association in order to do business with other members. Bernstein, *Cotton*, *supra* note 8, at 1738-39.

208. Otis Bilodeau & Jennifer Myers, *Pillsbury Winthrop's War of Words*, Legal

Like a traditional posting in an honor culture, the press release is aimed directly at the lawyer's reputation for integrity, and also appears to be designed to steer potential clients away from the rival law firm, thus striking at the confluence of the person's personal and public selves.<sup>209</sup> Also, like a posting, the press release brims with such inflammatory language that it invites a response from Latham & Watkins and Jensen, lest those lawyers be taken as outside of the company of gentlemen and gentlewomen. ("Sexual harasser" is probably equivalent to "poltroon" in modern discourse.) Alternatively, as Joanne Freeman has shown in her study of similar wars of words in the founding period, it may turn out that Pillsbury miscalculated its strategy and may itself lose honor.<sup>210</sup> The jury is still out, so to speak, on the Latham versus Pillsbury episode, and much depends on the reactions by peer firms and elite clients in the financial community.<sup>211</sup> In an honor-governed community, attacks and parries in duels of words are always enacted in public, and the prevailing party is anointed as such by public acclamation.

The critical prerequisite for the effectiveness of gossip as a means of social control is a small, relatively close-knit community, so that information about previous breaches is transmitted relatively inexpensively to others who may deal with the defector in the future. If it becomes too expensive or difficult to acquire this information, parties may just take their chances, and the defector will find new partners willing to extend courtesies and to cooperate, instead of imposing expensive procedural formalities at the outset of a relationship. If the defector is so inclined, she can exploit this cooperation and move on to the next victim. This seems to be the *modus operandi* of Wal-Mart, which has been sanctioned in numerous courts for discovery abuse.<sup>212</sup> Apparently Wal-Mart has a pattern of withholding internal memoranda on parking lot security in premises-

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Times, Sept. 9, 2002, at 10 (quoting Pillsbury Winthrop press release).

209. The diatribe was apparently motivated by another consideration familiar in honor cultures—loss of status. See Anthony Lin, *Jensen Drops Plans to Move to Latham*, 228 N.Y. L.J. 53, Sept. 17, 2002, at 1. Pillsbury felt that it had to respond because the news of the loss of a prominent mergers and acquisitions partner might hurt its ability to recruit in the senior lateral market for lawyers. See *id.*

210. Freeman, *supra* note 14, at 119. Alexander Hamilton's pamphlet attack on John Adams overreached, sounded more like a rant or a "vindictive personal assault" than a proper defense of Hamilton's character, and therefore harmed Hamilton's reputation, not Adams's. *Id.*

211. Preliminary indications are that the Pillsbury posting prompted Latham and Jenkins to call off the move. See Lin, *supra* note 209. Reading between the lines, it seems that Latham did not want to endure the adverse publicity associated with hiring an allegedly lazy sexual harasser. Jenkins is reportedly consulting with attorneys, and a defamation lawsuit appears all but inevitable.

212. See, e.g., Bob Van Voris, *Wal-Mart Evidence Suit Allowed: Woman Claims Retailer Destroyed Evidence*, Nat'l L.J., Nov. 12, 2001, at A5; Bob Van Voris, *Wal-Mart Had Memo on Risks to Shoppers: It Wasn't Disclosed in a Suit Over Rape*, Nat'l L.J., Sept. 3-10, 2001, at A1.

liability litigation. Although individual judges can become enraged when they learn of this practice, the information does not always get transmitted to other courts, and Wal-Mart is able to successfully withhold the information from ignorant plaintiffs. For this reason, the national scope of the market for legal services tends to destroy the effectiveness of gossip networks as a means for controlling unethical behavior by lawyers.<sup>213</sup>

One interesting suggestion of Bernstein's, though, is that it may be possible to employ "formal methods for transmitting reputation information,"<sup>214</sup> to harness the power of gossip networks even in larger-scale, less personalized markets. Sometimes this can be simple and dramatic, as this story from a professional responsibility casebook shows: An Oklahoma lawyer breached an oral promise to modify a discovery schedule, and when he realized he could create trouble for his adversary, insisted on holding to the written schedule.<sup>215</sup> The other lawyer made a motion to modify the schedule, which was denied, because of a local rule providing that any schedule changes had to be in writing.<sup>216</sup> At the conclusion of the motion hearing, however, the judge asked the winning lawyer (the defector) to turn and face the courtroom, which was crowded with other lawyers waiting to argue motions.<sup>217</sup> After the bailiff got the crowd's attention, the judge announced,

"I just want everyone to know how Mr. X practices law. He orally agreed to postpone certain discovery matters, but now is before this court arguing that his word is not enforceable because the agreement wasn't in writing as required by the local court rules. Take a good look at him now so you will know who you are dealing with in the future."<sup>218</sup>

The Pillsbury Winthrop "posting" described above is a similar event,<sup>219</sup> enacted on a larger stage. The press release attempts to broaden the scope of the effective gossip network to potential clients and other lawyers outside the immediate community of lawyers to which Mr. Jensen belongs. An occasional, high-profile (the incident

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213. Perhaps I am being too pessimistic about the effectiveness of gossip in a national market. Wal-Mart has apparently begun to shift its litigation strategy from an adamant refusal to be cooperative with plaintiffs to a more conciliatory approach. Part of the catalyst for this change was "widespread negative publicity for its hard-nosed litigation style." Catherine Aman, *Wal-Mart's Change of Heart*, Corp. Couns., Oct. 1, 2002, at 16.

214. Bernstein, *Cotton*, *supra* note 8, at 1752.

215. Robert F. Cochran, Jr. & Teresa S. Collett, *Cases and Materials on the Rules of the Legal Profession* 188 (1996). I have cited this story previously. Wendel, *Nonlegal Regulation*, *supra* note 49, at 1986 n.117.

216. Cochran & Collett, *supra* note 215, at 188.

217. *Id.*

218. *Id.*

219. See *supra* note 208 and accompanying text.

was mentioned in the *New York Times*<sup>220</sup>) statement may have the effect of spreading widely the news of an egregious breach of professional norms, but this mechanism is inadequate to deal with more quotidian transgressions. It is inconceivable that routine ethical breaches, such as renegeing on a scheduling agreement or providing evasive discovery responses, could be the subject of a public broadside. For one thing, the audience for press releases would quickly become insensitive to them, as lawyers issued public charges and denials over minor squabbles. Gossip that is ignored is not an effective nonlegal sanction. Another problem is that if the audience is too large, gossip loses its connection with concrete action against the offending lawyer. What, for example, am *I* supposed to do about Mr. Jensen? Thus, it is generally only in smaller, close-knit communities that we would expect to find flourishing gossip networks as a means for controlling lawyers.

Moreover, the gossip networks I have just described are those in which the participants are lawyers. Because a significant function of norms of professional ethics is to protect the interests of *clients*, we may be skeptical about the effectiveness of gossip as a substitute for other means of enforcing the rights of clients. Particularly in the case of individuals who are not sophisticated consumers of legal resources, or repeat players with respect to the litigation system, it is difficult to transmit sufficient information to the population of prospective clients to affect their hiring of counsel.<sup>221</sup> Even entity clients with in-house legal staff may not be able to learn reputation-specific information about lawyers in local legal communities scattered throughout the country. A great deal depends on context. If the prospective clients and lawyers are part of the same social circles, clients can probably pick up on adverse gossip and refuse to hire a lawyer who has become a professional pariah. This situation is probably limited to relatively small towns or subcommunities that are defined by a particular industry, as in Bernstein's example of all the players in the cotton industry who gather in a district of Memphis. Perhaps one of the functions of the civic organizations studied by Robert Putnam,<sup>222</sup> in addition to creating stores of "social capital," is to facilitate the transmission of negative gossip and positive information about the behavior of economic actors. If this is so, we can add the erosion of information-sharing networks to Putnam's list of negative consequences of the decline of participation in these activities.

To the extent we believe that informal transmission of reputational information is an effective way to regulate, the challenge is how to

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220. Jonathan D. Glater & Andrew Ross Sorkin, *Bitter Exchange by Law Firms Over the Hiring of a Lawyer*, N.Y. Times, Sept. 9, 2002, at C2.

221. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

222. Putnam, *supra* note 6.

increase the information-sharing ability of participants in the market for legal services. It is not as daunting as the project of rehabilitating social structures that facilitate civic engagement—"restor[ing] American community for the twenty-first century"<sup>223</sup>—which is the task to which Putnam has set himself. The reason is that some of the structures for sharing information may already be in place. For instance, an active trade press reporting on an industry can be an extremely valuable asset for nonlegal regulation.<sup>224</sup> *The American Lawyer*, for example, reports on ethically questionable practices that harm clients, such as adding surcharges to billings for expenses like photocopying and the use of fax machines,<sup>225</sup> and conducting abusive discovery.<sup>226</sup> The magazine is widely read by in-house lawyers, who can take these reports into account when they hire outside counsel. Regional or industry-specific publications perform a similar function in various subcommunities.<sup>227</sup> Professionals and client representatives also attend trade fairs and conferences at which they informally exchange information, and social ties built up through these interactions facilitate gossip networks.<sup>228</sup>

Some industries have experimented with larger-scale social planning in order to create a community that more effectively regulates its members. In the cotton industry, the trade association sponsors debutante balls, an annual civic cotton carnival, golf tournaments, a domino tournament, and annual conventions that are designed to be family events.<sup>229</sup> Similarly, the Diamond Dealers Club provides kosher restaurants for its members, a Jewish health organization to provide emergency services, a synagogue on the premises, and even group-travel discounts so that members' families can vacation together when the bourse is closed.<sup>230</sup> In the legal profession, the closest analogue is probably the American Inns of Court movement, which aims to bring practitioners and judges together, along with law students and academics, to discuss real-world

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223. *Id.* at 403.

224. Bernstein, *Cotton*, *supra* note 8, at 1753.

225. Susan Beck & Michael Orey, *Skaddenomics: The Ludicrous World of Law Firm Billing*, *Am. Law.*, Sept. 1991, at 3.

226. Stuart Taylor, Jr., *Sleazy in Seattle*, *Am. Law.*, Apr. 1994, at 5.

227. *See, e.g.*, Bernstein, *Diamond*, *supra* note 8, at 144. Most cities or regions have a newspaper or magazine like the *Puget Sound Business Journal* in Seattle that reports on local businesses and professional firms such as accountants and lawyers. In my experience, lawyers worry about adverse publicity in these journals, because they believe that in-house lawyers at clients and prospective clients read them carefully. The managing partner of the law firm mentioned in one article specifically addressed concerns that "opposing counsel, and perhaps even some judges, [might come] to mistrust Bogle attorneys in similar situations." Alex P. Fryer, *Dismaying Discovery: Sanctioned Again, Bogle Says It's Taking Steps to Keep the Courts Satisfied*, *Puget Sound Bus. J.*, Nov. 17-23, at 1.

228. Macaulay, *Non-Contractual Relations*, *supra* note 9, at 64.

229. Bernstein, *Cotton*, *supra* note 8, at 1750-51.

230. Bernstein, *Diamond*, *supra* note 8, at 139-40.

issues that arise in legal practice.<sup>231</sup> Although not explicitly stated as a goal of the organization, the meetings probably also serve to transmit positive and negative information about the reputation of local lawyers and judges. Local bar associations frequently sponsor lunches and banquets that also facilitate social ties.

One specific prescriptive conclusion that flows from the importance of information-sharing is that lawyers must have enough time to develop social bonds with others. This is a major conclusion of Robert Putnam's work on social capital. He challenges employers: "Let us find ways to ensure that by 2010 America's workplace will be substantially more family-friendly and community-congenial, so that American workers will be enabled to replenish our stocks of social capital both within and outside the workplace."<sup>232</sup> Replace "replenish stocks of social capital" with "develop useful ties with other professionals and clients in the relevant markets," and this passage can serve as a prescription for law firms to create more humane working environments for lawyers. Anthony Kronman, among others, has pointed out the ways in which pressure to bill unreasonable hours contributes to the atrophy of the faculty of professional judgment—lawyers who do not have time to develop broader interests, to read widely, experience art, cultivate civic and community ties, and build friendships and family relationships have less of a storehouse of experience and wisdom from which to draw in ethical reasoning.<sup>233</sup> Even if one does not accept Kronman's Aristotelian conception of ethics, Putnam's point is that community activities and a network of social relationships are instrumentally useful to preserving certain social goods. Quite apart from affecting the ability of individual practitioners to acquire virtue (Kronman's concern), onerous billable-hour requirements may interfere with the ability of lawyers to develop social networks that facilitate the transmission of information about one another's character and actions.

The alternative to strengthening social bonds is to rely on "formal methods for transmitting reputation information."<sup>234</sup> This sounds paradoxical, but it is only one step removed from encouraging a flourishing trade press, for instance. The example mentioned above, where the judge chewed out a lawyer in front of the gallery of lawyers waiting for their cases to be called on civil motions calendar,<sup>235</sup> is an excellent example of transmitting reputation information through

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231. The organization's website states: "An American Inn of Court is an amalgam of judges, lawyers, and in some cases, law professors and law students. Each Inn meets approximately once a month both to 'break bread' and to hold programs and discussions on matters of ethics, skills and professionalism." General Information, at <http://www.innsofcourt.org> (last visited Sept. 10, 2002).

232. Putnam, *supra* note 6, at 406.

233. Kronman, *supra* note 21, at 295-307.

234. Bernstein, *Cotton*, *supra* note 8, at 1752.

235. See *supra* text accompanying note 209.

what are otherwise formal channels. It would be useful if judges would do more of this. I know from serving as a law clerk that there are cases in which the lawyers had damaged their credibility and affected the judge's willingness to accept their representations in the briefs. (It was my job as a law clerk to comb the record to see if the lawyers were exaggerating or summarizing the record fairly.) Unfortunately, these judicial impressions seldom make it into written opinions, so there are few observable traces of the effect of a poor reputation on the success of a lawyer's advocacy.<sup>236</sup> I do not know what accounts for the judicial reluctance to expose unethical conduct by lawyers. Perhaps judges are worried about being reversed or subjected to recusal motions. Remember that evaluations of unethical conduct tend to appear subjective, because they are so influenced by contextual factors. Judges do not want to appear to act arbitrarily, and the "I-know-it-when-I-see-it" nature of the ethical evaluation here may cause judges to be reluctant to try to elaborate on the reasons for their reactions. In the absence of some good reason for reticence, however, judges who are motivated to rule against a lawyer because of the lawyer's unprofessional conduct owe it to the bar to point out the conduct and its consequences in opinions and orders.

In business, the best known formal means for sharing information about a party's history of cooperation is the credit agency, such as Dun and Bradstreet. There are highly specialized examples of information-sharing agencies in certain industries, such as trade associations in the cotton industry that serve as a clearinghouse for information pertaining to "the moral integrity, ability to judge cotton, or financial responsibility of any cotton firm or commission buyer in the cotton belt."<sup>237</sup> Many lawyers would recoil from the idea of a moral-integrity credit agency, perhaps finding the concept a bit too Big Brother-ish for their tastes. Some have proposed a related concept, however—strengthening voluntary associations whose membership requirements serve, in effect, as a guarantee of the probity of members. The fact of membership in one of these organizations thus serves as a signal to potential transaction partners, a game theory concept which is addressed in the next subsection.

### C. Signaling

If adversary litigation—either in general or in a particular case—cannot be modeled as a repeated game, but is rather a one-shot

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236. For a rare, but hopeful exception, see John Council, *Provost Umphrey Pulls Appeal After Harsh 5th Circuit Memo*, 18 Tex. Law. 30 (2002) (describing how appellate panel sent memo to court clerk advising law firm that, if it did not submit substitute briefs free of factual misstatements, misleading omissions, and out-of-context quotations, the lawyers would be subject to various possible sanctions).

237. Bernstein, *Cotton*, *supra* note 8, at 1752.

prisoner's dilemma,<sup>238</sup> bonding will not be an effective means to ensure cooperation among the lawyers. A lawyer can defect on round one (the only round) and not face retaliation from her adversary on the next iteration. Gossip and threatening the reputation of one's adversary is a possible response. The aggrieved adversary can spread the word of the uncooperative disposition of the offending lawyer, harming the lawyer's ability to function effectively in future cases. Ideally, though, we would like to use nonlegal methods to ensure cooperation from the outset, rather than only responding after the fact to breaches of professional norms. Cooperative lawyers should enjoy an advantage in their dealings with opposing counsel, because adversaries would rather interact with cooperative lawyers than those who are willing to defect from the mutually beneficial solution. In game theory terms, assuming a market is small and sufficiently free of noise, lawyers can take actions that function as a *signal* to a potential adversary. Strangers who are considering transacting with one another can use costly actions to prove to each other that they are willing to make investments of resources with a short-term cost, in order to achieve the benefits of a long-term cooperative relationship.

Signaling is required when each party would like to know whether the other is inclined to cooperate.<sup>239</sup> Because "talk is cheap" and parties can costlessly promise the sun, the moon, and the stars, it is impossible simply to reassure the other of one's disposition to cooperate. If one of the parties could take a costly action that revealed a cooperative disposition, however, then observers could be assured that the party would not defect from the cooperative solution to the prisoner's dilemma.<sup>240</sup> The adversaries of lawyers who are known to be cooperative would start out the relationship on a cooperative footing; conversely, anyone dealing with a notorious defector would start out cautiously and defensively, to avoid the risk of having her own cooperation exploited.<sup>241</sup> For example, William McLucas, the former head of the enforcement division of the SEC and now a partner at Wilmer, Cutler & Pickering, is widely known as tough on corporate fraud; "calling in Wilmer" is therefore a signal that a corporation is serious about investigating wrongdoing because it is costly—it deprives the client of the opportunity to stall, evade, and play games to resist a government investigation of suspected fraud.<sup>242</sup> Once a client has taken this costly step, others who deal with it (such

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238. Gilson & Mnookin, *supra* note 7, at 521-22.

239. See generally Douglas G. Baird, et al., *Game Theory and the Law* 122-42 (1994); Edward Rock & Michael Wachter, *Meeting By Signals, Playing By Norms: Complementary Accounts of Nonlegal Cooperation in Institutions*, 36 U. Rich. L. Rev. 423 (2002).

240. Eric A. Posner, *Law and Social Norms* (2000).

241. Macaulay, *Non-Contractual Relations*, *supra* note 9, at 64.

242. See Otis Bilodeau, *What Happened to Mark Belnick?*, *Legal Times*, Sept. 16, 2002, at 1.



as government investigators) are likely to be more cooperative, for example by accepting factual representations at face value without requiring expensive “due diligence” to supply corroborating evidence.

William Simon is one important scholar of the legal profession who is attracted to the idea of signaling. In particular, he suggests signaling through the act of joining voluntary associations or law firms with a reputation for probity—“high commitment” to ethics, as he calls it.<sup>243</sup> The act of associating oneself with one of these organizations is costly, because it deprives the lawyer of the opportunity to defect opportunistically. A lawyer would be willing to bear this cost, however, because it would result in a greater long-run gain, as a result of the lawyer’s ability to attract clients who are looking for high-commitment lawyers. Although lawyers sometimes assume that all clients are seeking attack-dog advocates, many clients do recognize the value of being represented by a lawyer who is known as a cooperator—namely, the additional credibility before courts and third parties that the lawyer enjoys, which results in less expense for the client and a greater likelihood of favorable judicial decisions where the judge has discretion in how to rule. The problem is that if there are enough of these clients out there, a low-commitment lawyer may be able to mimic the actions taken by high-commitment lawyers and thus attract away that lawyer’s clients. An action is effective as a signal of one’s commitment level only if it is sufficiently costly in the short-run that only genuinely high-commitment lawyers would be willing to incur it.

Summarizing criticism I have offered in greater detail elsewhere,<sup>244</sup> there are a couple of reasons why signaling mechanisms may not enable clients seeking high-commitment lawyers to retain only those lawyers, and not low-commitment lawyers. One is that law firms tend not to have monolithic reputations. With respect to any given firm, some opposing lawyers regard it as full of unethical or low-commitment lawyers, and some perceive it as high-commitment.<sup>245</sup> The situation is even worse for voluntary organizations; the Gilson and Mnookin study of the American Academy of Matrimonial Lawyers, for example, revealed that there were both high- and low-commitment lawyers within the organization.<sup>246</sup> The other lawyers know the commitment levels of their peers, but outsiders—that is, potential clients—cannot use the fact of Academy membership as a

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243. William H. Simon, *Who Needs the Bar? Professionalism Without Monopoly*, 30 Fla. St. U. L. Rev. (forthcoming 2003). Posner refers to individuals in this category as “good types” who, on his definition, have a low discount rate. Posner, *supra* note 240, at 19-22. That means they are more willing to defer short-term gains in the interests of long-run benefits that flow from cooperation. *Id.*

244. W. Bradley Wendel, *Busting the Professional Trust: A Comment on Simon’s Ladd Lecture*, 30 Fla. St. U. L. Rev. (forthcoming 2003).

245. Nelson, *supra* note 30, at 796-97.

246. Gilson & Mnookin, *supra* note 7, at 556-58.

guarantee that any particular lawyer has a high level of commitment to a cooperative style of dealing.<sup>247</sup> If the organization were willing to expel the low-commitment lawyers, on the other hand, membership would have some meaning. The second problem with signaling is that there is too much variability in the way certain actions should be interpreted. Just as there is good-faith disagreement over whether deception in negotiation is “ungentlemanly” or “tactics,” and whether surreptitious taping of phone conversations is dishonorable or legitimate,<sup>248</sup> we may expect similar disagreement over whether one of these actions will be regarded as defection from the cooperative relationship between the parties. The result is a great deal of “noise” in the marketplace, which interferes with the signaling mechanism. As Gilson and Mnookin observe:

Noise is the enemy of cooperative strategies. The more difficult it is to tell whether one’s opponent is cooperating, the more likely it is that mistakes will occur, leading to unnecessary conflict. At the extreme, mistaking cooperation for defection a single time can result in eternal conflict between tit-for-tat players. We hypothesize that as litigation grows more complex the parties are less likely to understand fully their own and their opponent’s interests, and as a result, their opponent’s actions will grow noisier. Noise, in turn, leads to misunderstanding and unnecessary conflict.<sup>249</sup>

The problem would be even worse for episodic participants in the litigation system, who are not as adept at interpreting others’ actions as either cooperation or defection. Because repeat players are already protected to some degree through bonding mechanisms, signaling seems either redundant (for those litigants) or ineffectual because of the problem of noise.

The other problem with permitting any group, either a voluntary association or a quasi-state actor such as a bar association, to screen out applicants on the basis of character is that the screening process may be used to exclude unpopular applicants, with “ethics” or “character” being used as the rationale for exclusion. The best known example of this process at work is the misuse of character and fitness requirements to deny suspected Communists admission to the profession in the 1940s and 1950s.<sup>250</sup> The present-day analogue might be attempts to discipline lawyers for alleging racial bias by courts. In

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247. Simon acknowledges that this variability diminishes the value of membership as a signal. See Simon, *Practice of Justice*, *supra* note 184, at 213-14.

248. See *supra* text accompanying notes 130-31.

249. Gilson & Mnookin, *supra* note 7, at 548.

250. See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491 (1985). For the Supreme Court’s response to these character-and-fitness inquiries, see *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971); see also *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971); *In re Stolar*, 401 U.S. 23 (1971); *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957); *Schwartz v. Bd. of Bar Exam’rs of N. M.*, 353 U.S. 232 (1957).

one case, an African-American lawyer was punished for referring to a trial judge as “either . . . completely incapable of recalling significant facts, or . . . an unmitigated liar.”<sup>251</sup> The federal district court abstained from the Virginia disciplinary proceedings,<sup>252</sup> but it is reasonable to wonder whether the sanctions order was motivated in part by the lawyer’s “race and professional style,”<sup>253</sup> rather than generally applicable principles of professionalism. It is telling that the bar committee that investigated the lawyer’s conduct kept an “extensive file” containing information about matters not related to the conduct at issue,<sup>254</sup> recalling the dossiers assembled by J. Edgar Hoover’s FBI. In a similar case, although a court ultimately refused to impose discipline, the Oklahoma Bar Association attempted to punish a black lawyer who had called a trial judge a racist.<sup>255</sup> Finally, the Eleventh Circuit affirmed sanctions against a lawyer who had accused opposing counsel of being a racist bigot.<sup>256</sup>

Whatever the merits of the allegations of racism, the lawyers involved in these cases potentially face the full panoply of informal sanctions—distrust by opposing counsel and judges, exclusion from referral networks, and so on—on the basis of being deemed unethical because of making an inflammatory charge against a judge or opposing lawyer. The unpopularity of a lawyer, the lawyer’s client, or the position asserted by the lawyer increases the risk that a judge or litigation adversary will perceive an action as unprofessional and deserving of some kind of nonlegal sanction. To put it in game-theory terms, opponents may regard this conduct as a defection from expected norms of cooperation, and respond with some kind of retaliatory measure, even though the underlying charge may be warranted.

#### IV. CONCLUSION: IMPLICATIONS FOR LEGAL REGULATION

I am not suggesting that we turn back the clock to a time in which legal regulation of the discovery process was completely absent. Nonlegal sanctions are not sufficient by themselves to ensure that the system functions effectively. The history of the legal regulation of pretrial litigation is not uniformly bleak, and in some respects discovery is more efficient than it was before the extensive legalization of the process.<sup>257</sup> It would be naive in the extreme to believe that the problem of discovery abuse will go away if communities of lawyers are simply left to their own devices to control

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251. *Greene v. Va. State Bar Ass’n*, 411 F. Supp. 512, 514 (E.D. Va. 1976).

252. *See id.* at 517 (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

253. *Id.* at 516.

254. *Id.* at 517.

255. *State ex rel. Okla. Bar Ass’n v. Porter*, 766 P.2d 958 (Okla. 1988).

256. *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2002).

257. *Beckerman*, *supra* note 37, at 560-61.

unethical behavior. For one thing, there are obstacles to the nonlegal regulation of the profession in many instances. As noted above, nonlegal regulation works best in small, close-knit communities in which lawyers are likely to be repeat-players with respect to each other and the population of clients.<sup>258</sup> The trend toward an increasingly national, and even global, legal practice is moving contrary to the direction that would bolster the capacity of local legal communities to control misbehavior by their members. Even seemingly technical issues, such as the permissibility of multijurisdictional practice by lawyers, have implications for the efficacy of nonlegal sanctions. Although many commentators decry strict state enforcement of unauthorized practice of law statutes as parochialism and featherbedding by in-state lawyers, local licensing does tend to encourage lawyers to practice within a geographically limited area, which tends to enhance information-sharing and nonlegal sanctioning.

It is also important not to become too “warm and cuddly”<sup>259</sup> about the concept of a self-regulating professional community. Debutante balls and cotton carnivals<sup>260</sup> are nice if you are allowed in the door, but small societies and communities such as the Memphis cotton dealers can be unwelcoming, or downright hostile to outsiders. The *ABA Journal*’s article on the civility and decency of Charleston lawyers only obliquely acknowledged the famously clubby atmosphere of the legal community, with its references to the Old Guard and “out-of-towners.”<sup>261</sup> The magazine featured an African-American lawyer on the cover, but one wonders how willing the community was to embrace the prospect of an integrated bar. Although it was certainly not unique in this respect, the elite of Charleston society closed ranks against attempts by African-Americans to achieve equality in the 1940s, and ostracized a federal district court judge, a former member of the social A-list, who ruled in favor of the plaintiffs in a civil rights case.<sup>262</sup> To put it bluntly, there is no guarantee that a community’s norms that are enforced by nonlegal sanctions are morally attractive ones. Lawyers in small communities often report that they are more concerned with appeasing powerful institutional actors in that community, not necessarily with being as effective on behalf of their clients as they could be.<sup>263</sup> Undoubtedly this is a good thing in some

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258. See *supra* text accompanying notes 205-06.

259. Putnam, *supra* note 6, at 21.

260. See Bernstein, *Cotton*, *supra* note 8, at 1750-51.

261. Tebo, *supra* note 136, at 79. I base my characterization of the Charleston legal community on the reports of many of my law students who have worked there for the summer, and also on general “grapevine” reports about the practice environment of many cities in the region.

262. See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* 298-301 (1975).

263. Donald Landon, *Country Lawyers: The Impact of Context on Professional*

cases. Everyone, including clients, would be better off if opposing lawyers got along well and refrained from discovery abuse and wasteful litigation. There are times, however, when a lawyer's job is to use every means at her disposal on behalf of her client, even if that means angering opposing counsel and the court. Overuse of nonlegal sanctions might chill effective advocacy just as surely as the overly enthusiastic use of Rule 11 sanctions was believed to have a disproportionate impact on certain categories of unpopular litigants such as prisoners.

Legal and nonlegal sanctions have their own peculiar pathologies. Legal sanctions can be cumbersome, expensive to invoke, and time-consuming. It can be difficult to specify in advance all of the circumstances that justify sanctions, and violations of legal sanctions can be difficult to verify before a third-party decisionmaker. Legal sanctions are susceptible to gaming and abuse by knowledgeable lawyers. They are also vulnerable to institutional breakdowns caused by common conditions such as clogged dockets and overworked judges. At the same time, nonlegal sanctions are dependent upon the prevailing norms of the community, which may or may not be the norms we would like to see incorporated into a regime of professional regulation. Nonlegal sanctions tend not to exhibit the rule-of-law virtues such as predictability, impartiality, and ascertainability. Even though most lawyers know the difference between "hardball" and decent but aggressive advocacy, a statute that prohibited hardball would almost certainly be held void for vagueness. The reasons for this are understandable—the rules of the game should be known in advance, and applied fairly, without regard to the identity of the parties, and courts worry a great deal about the potential for abuse of vague statutes. Nonlegal sanctions rely on the community to police itself, but if the community becomes too much like a club, then lawyers can find themselves blackballed for angering powerful members of that club; this result is antithetical to the rule of law.

For this reason, it is impossible to draw a neat bottom-line conclusion in favor of, or against, nonlegal sanctions. Like the evaluation of the activities they regulate, the evaluation of nonlegal sanctions proceeds on a case-by-case basis. The lesson of "looking back," however, is that the alternative to extensive legal regulation of the profession is not *nothing*, but nonlegal regulation. In some cases,

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Practice (1990); Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 Law & Soc'y Rev. 15 (1967) (finding that public defenders are often more concerned with developing a reputation for reasonableness and cooperativeness than with representing their clients through all means at their disposal); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 L. & Soc'y Rev. 115 (1979) (reporting that, in small towns, lawyers representing debtors in collection cases did not use the full range of available legal defense on behalf of their clients, because most of their business came from local merchants who would be unhappy with overly aggressive representation of debtors).

it has proved to be fairly effective. There are ways to make nonlegal regulation more effective. Perhaps these responses ought to be considered, as an alternative or a supplement to increased legal regulation, whenever some problematic aspect of legal practice becomes known. In the case of discovery, it couldn't hurt.